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APPELLANTS' BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. 7[redacted]268

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, ET AL., APPELLANTS

vs.

W. W. SCHLECHT AND DAVID C. CAYLOR

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED_____, 1922

(28,695)

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IN THE

Supreme Court of the United States

October Term, 1921

Yuma County Water Users' Association, Robert H. Theilmann, J. A. Donovan, Ralph Thurman and Archie J. Griffin,
Appellants.

vs.

W. W. Schlecht and David C. Caylor, Appellees.

No. 740

APPELLANTS' BRIEF

STATEMENT OF THE CASE

1. This case is here on appeal from the Decision and Judgment of the U. S. Circuit Court of Appeals, Ninth Circuit, (Trans. Rec. p. 632-635) which affirmed a Decree in Equity of the U. S. District Court for the District of Arizona (Trans. Rec. p. 547-564) denying the plaintiffs there, appellants here, the relief prayed for in their complaint: mandatory injunctive relief as to the furnishing of irrigation water to the lands of appellants.

2. It arises under the Act of Congress of June 17, 1902 (36 Stat. 388), commonly called the Reclamation Act, and involves the interpretation and construction of that Act, particularly Sections

4, 3 and 2 thereof, as well as a certain contract made thereunder in May, 1906 (Trans. Rec. p. 41).

3. The principal Appellant, Yuma County Water Users' Association, being a private Arizona Corporation, but organized at the request, under the directions of, and according to rules laid down by, the Secretary of the Interior of the United States, in accordance with Sections 5, 6 and 10 of the Reclamation Act, it being one of more than a score of similar corporations organized throughout the West for the better and more convenient working of that Act; the other appellants being constituent members of the Association, and land owners within the district over which the Association exercises control.

4. The defendants are the local officers of the Yuma Project of the U. S. Reclamation Service, Project Manager and Irrigation Manager, respectively, in charge of the distribution of irrigation water to the lands of the appellants.

5. The controversy arose from the following

STATE OF FACTS:—

a. The lands involved are located on the Arizona side of the Colorado River, above and below the confluence of the Gila at the town of Yuma, Arizona (see Plat p. 40, Trans. Rec., also p. 9 hereof). At the time of the passage of the Reclamation Act practically all of the lands affected, except a score, or so, of quarter sections adjacent to the Gila River, were in what is known as "private ownership," as distinguished from the public domain, i. e., the Yuma Project lands had practically all passed away from the U. S. government by either

patent, or entry under the homestead or desert land laws. Nevertheless, immediately on the approval of the Reclamation Act on June 17, 1902, all lands in the vicinity of Yuma, Arizona, and within six miles of the Colorado River, were withdrawn under the Second Form, according to the provisions of that act, which withdrawal embraced all the land here involved, but practically affected very little of it, for the reason that it was in private ownership. In the Fall of 1902 survey of the Yuma Project were commenced by the U. S. Geological Survey, the predecessor of the U. S. Reclamation Service, in accordance with the provisions Section 2 of the Reclamation Act, which were prosecuted with diligence for about 18 months at a cost of $174,735.85 (9th Annual Report U. S. Reclamation Service, p. 82), which resulted in the completion and presentation to the Secretary of the Interior of elaborate maps, plans and estimate of cost, in accordance with the provisions of Sec. 3 of the Reclamation Act (see Pltffs'. Ex. pp. 164 to 198, Trans. Rec.), and finally, under date of April 8, 1904, a board of consulting engineers, including the present director of the U. S. Reclamation Service, determined the Yuma Project to be feasible, and recommended the setting aside of $3,000,000.00 in the Reclamation Fund for the construction thereof (Trans. Rec. p. 235); which recommendations met the approval of the Director of the U. S. Geological Survey (Trans. Rec. p. 199), who in turn on May 9, 1904, made the same recommendations to the Secretary of the Interior, who immediately, May 10, 1904, adopted the recommendations, declared 85,000 acres of said lands reclaim-

able at a cost of less than $40.00 per acre, and set aside $3,000,000.00 from the Reclamation Fund for the construction of the Yuma Project (Trans. Rec. p. 201), thereby, as appellants here contend, determining the feasibility of the project, the ESTIMATED COST thereof, within the meaning of Sec. 4 of the Reclamation Act, and IRREVOCABLY fixing the charges per acre at less than $40.00, the MAXIMUM which can be collected from the lands, and returned to the Reclamation Fund; the appellees contending that all the surveys, determinations, recommendations, and the actions of the secretary were merely "TENTATIVE," and that the estimated cost was not determined until some 13 years later by another Secretary of the Interior, and at the figure of $75 per acre, which must be paid.

b. In the meantime, the lands in the proposed Yuma Project being practically all in private ownership, as before stated, and there being no feasible or practical method of the U. S. government dealing with the individual landowners and entrymen, and following the plan already adopted and followed by the Secretary of the Intreior for dealing with a like class of landowners and entrymen in the Salt River Valley in Arizona, the Yuma County Water Users' Association was organized on Nov. 3, 1903, as an Arizona corporation, on a plan whereby the shareholder by signing a short agreement (Trans. Rec. 209), and subscribing for the capital stock of the Association, ipso facto mortgaged his land to secure the payment of the cost of the construction of the project. The Association had but little more than skeleton organization until May 28, 1904, when there was a mass meeting of the landowners called,

at the request of the chief engineer of the U. S. Geological Survey, and held under the joint auspices of the Association and the Reclamation Service, at Yuma, Arizona, which was widely advertised and well attended (such mass meetings being also a part of the plan adopted and prescribed by the Interior Department for the final floating of U. S. Reclamation Projects. See Par's 8, 9 and 10 of the Manual for the organization of Water Users' Associations, page 140 hereof). At that meeting maps and plans were displayed, public speeches made by the Chief Engineer and Supervising Engineer of the U. S. Geological Survey, and others; a prospectus, consisting of a pamphlet, in which was incorporated the secretary's letter of May 14, 1904, fixing the charges at less than $40.00 per acre, and setting aside the $3,000,000, was circulated, read and discussed (Pltffs' Exhibit 15, Trans. Rec. p. 213); strong hopes were held forth by the said engineers that the project could be, and would be, completed for the estimate within two years from the actual commencement of work; considerable enthusiasm aroused; and great numbers of landowners then and there "signing up," as the process of simultaneously subscribing for stock of the Association, and mortgaging their lands to secure the cost of the project, was called; with the later result that in the Fall of that year 98 per cent of the lands were "signed up," and the Yuma Project became an assured success as to its beginning.

c. At the time of the passage of the Reclamation Act, and until the coming into the irrigation field

at Yuma, Arizona, of the United States, acting through its Geological Survey, and its successor, the Reclamation Service, there were in active operation three canal systems below the Town of Yuma serving irrigation water to part of the lands in what is designated as "Tract C" on the plat set forth at page 9 hereof. Those canals were inadequate and somewhat inefficient, owing to their inability to handle the large amount of silt carried by the waters of the Colorado River. They were later taken over and operated by the U. S. Reclamation Service during the long delay in the construction of the Yuma Project from 1905 until 1917. There was also a proposed irrigation plan offered by a private corporation, Colorado Delta Canal Company, on a larger and more elaborate scale, as to area, at least, than the later-adopted Yuma Project (see Plat, p. 243 Trans. Rec.); and at the time that the Secretary of the Interior determined that the Yuma Project was feasible, May 10, 1904, that private corporation was a formidable competitor to the United States as the prospective constructor of an irrigation project for the lands here involved, soliciting the execution of, and was having executed and delivered to it, contracts whereby portions of the said lands were being pledged to it to secure the cost of its proposed project, and whereby it undertook to furnish water to those lands for a construction charge of FIFTEEN DOLLARS per acre (see Pltffs' Ex. 18, p. 245 Trans. Rec.), with interest, however, as against $35 per acre for the proposed Government Project; and just prior to May 28, 1904, it was a seriously debated question as to which project would be adopted by the land-

owners (see testimony of Oscar P. Bondesson, page 239, 240-1 Trans. Rec.).

d. Whatever disagreement there may be as to the legal effect of what had taken place prior to and on May 28, 1904, including the declaration of the Secretary of the Interior under date of May 10, 1904 (Rec. p. 201), it may safely be asserted as a fact that the landowners believed on what seemed good reasons to them, that they were to get a going, substantial, first class irrigation project for the gross sum of $3,000,000, and at a cost of probably less than $35 per acre, and in no event to exceed $40.00 per acre, and that by "signing up" they were entering into a contract to that effect.

e. The result of "signing up" was that in the Spring of 1905 a contract was let to a New York contractor for the construction of the Laguna Dam, the most important part of the construction, at the contract price of nearly $800,000.00, and later in the same year contracts were let for some 12 miles of levees, another important part of the work. as will be seen from the Plat at page 228 Trans. Rec.; work began on both contracts within a few months after their letting.

f. At this point we reach one of the closely contested points in this case. Nothwithstanding that Sec. 4 of the Reclamation Act required the Secretary of the Interior, upon his determination that the Yuma Project was feasible, etc., to THEREUPON give public notice of the charges per acre, etc., no formal PUBLIC NOTICE, so designated by that name, was, so far as disclosed, formally published, under that name, until THE PUBLIC NOTICE of April 6, 1917 (Trans. Rec. p. 469)—

the appellees contending below and, no doubt, here that, whatever the dictionary or common meaning of the word thereupon may be, with the Secretary of the Interior it means some 13 years thereafter; the appellants contending that no public notice was necessary to fix and determine the charges per acre, and that, in any event, considering the publicity given the Pamphlet, Pltffs' Ex. 15 (Trans. Rec. pp. 215 to 288), and other public happenings, public notice was actually given to all interested parties within the meaning of the law.

g. On May 31, 1906, after its submission to the constituent members of the Association, a contract was entered into between the Association, in its corporate capacity, and the Secretary of the Interior (Trans. Rec. p. 41), whereby the Association undertook to promptly collect, or require prompt payment, and guaranteed payment for "that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders," in ten annual installments, the first payable "at the time of the completion of said proposed works"; with nothing more definite as to amount or time of payment. This contract is here for construction—appellants claiming that it should be read and construed in view of the law and the intention of the parties at the time of its execution; the appellees claiming it is unambiguous and speaks for itself.

h. The lands involved here are naturally divided into three different physical, or geographical, portions, designated Tracts A, B and C, in appellants' complaint (see map, opposite page), being,

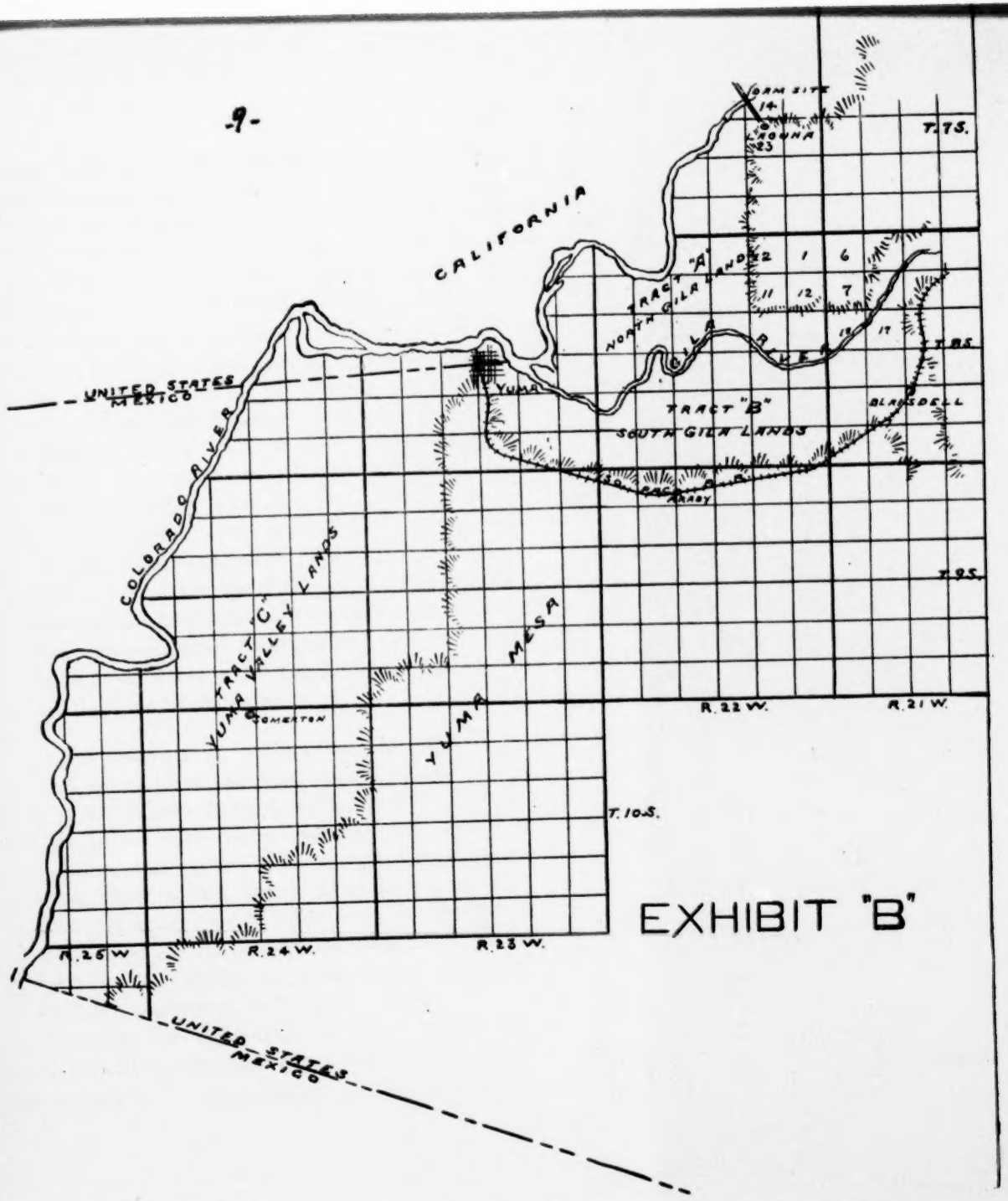

DAM SITE
LAGUNA
T. 7 S.
CALIFORNIA
TRACT "A"
NORTH GILA LANDS
GILA RIVER
T. 8 S.
UNITED STATES
MEXICO
YUMA
TRACT "B"
SOUTH GILA LANDS
BLAISDELL
PACIFIC R.R.
ARROY
T. 9 S.
COLORADO RIVER
TRACT "C"
YUMA VALLEY LANDS
COMMERCIAL
YUMA MESA
R. 22 W.
R. 21 W.
T. 10 S.
R. 25 W.
R. 24 W.
R. 23 W.
UNITED STATES
MEXICO

EXHIBIT "B"

respectively, the lands north of the Gila River, and south and east of the Colorado River; the lands south of the Gila River, and east of the Town of Yuma; and the lands east of the Colorado River, and southwest of Yuma; they being the lands constituting the "Lower Colorado Irrigation District" described in the Association's Articles of Incorporation, and the contract of May 31, 1906 (pages 39 and 41, Trans. Rec.). In Tract A considerable work was done, and irrigation water furnished by the Reclamation Service, as part of the project, for many years until the commencement of this suit below; nothing was ever done on the South Gila lands, except some levees erected in 1906, which were later abandoned. Tract C is practically completed except for the drainage system; it being a contested question here as to whether that feature is even now completed as originallyl proposed, and it was not completed at the filing of this suit below, nor at the time of the trial.

i. The contract, in writing, for the completion of the Laguna Dam, the most important and costly part of the Yuma Project, provided for its completion within two years—bearing out the oral promises of the engineers at the mass meeting of May 28, 1904 (p. 266 Trans. Rec.) and work was begun thereon on Aug. 1, 1905, there being a bond in $160,000.00 for its completion within two years p. 95 Trans. Rec., Defts' ans.), but in the early part of 1907 the contractor, by mutual consent, was released from the obligations of his contract and bond, when its contract was about one-half completed; the U. S. Reclamation Service taking the

work over, and thereafter prosecuting it, and practically all other work on the project, by what is known as "Force Account," down to the present time. "The proposed irrigation works" were not completed within two years from the commencement of the works, and they are not yet, as stated, physically completed, by about 40 per cent, as originally proposed—the appellees contending, and the Trial Court holding, that they are completed "for all practical purposes"—but work was carried on, after a fashion, for 12½ years until Tract C, ONLY, had reached such a stage of completion that the Secretary of the Interior deemed it completed, or practically completed, within the meaning of the law and the contract! (although as a fact, more than 19 miles of the main drainage canal in Tract C was yet to be built) and that thereby "the proposed irrigation works" were completed as a whole, and that the time had arrived to enforce the payment of the first annual installment of the cost, and under date of April 6, 1917, he issued a purported Public Notice (Trans. Rec. p. 469) to that effect, announcing the cancellation, on a future date, of all temporary water contracts with the individual landowners, under which irrigation waters had been furnished by the government to some of the lands involved for some years prior thereto, assumed to fix the charges at $75.00 per acre, and proclaimed that unless a certain form of contract (Trans. Rec. p. 48) were executed and delivered to the Project Manager at a certain future date all irrigation water would be denied to the lands belonging to such non-complying landowner—the lands thus denied water, of

course, being thereby rendered valueless, for at Yuma, Ariz., land without water is nothing. These threats affecting some landowners immediately, some others within a month or two, and all not later than Dec. 31, 1917. Those threats were to be, of course, put into effect by the defendants, they having control of the distribution of the water.

j. At the time of the issuance of the Public Notice, April 6, 1917, nor at the filing of this suit, July 1, 1917, nor on the granting of the Order for the Preliminary Injunction, July 6, 1917, no intimation, official or otherwise, had ever been given by the Secretary of the Interior, or any officer or employee of the U. S. Reclamation Service, that Tracts A and B, as delineated on the Plat, page 9, were not part of the project; but, on the contrary, in each and every Annual Report of the Secretary of the Interior to Congress, required to be made by Sec. 2 of the Reclamation Act, as to the cost, etc., of the work in progress, from the third, in December, 1904, until the fifteenth, in December, 1916. those tracts had been reported and treated as an integral and feasible parts of the Yuma Project.

6. Shortly after the issuance of the Public Notice of April 6, 1917, the plaintiffs instituted this suit in the U. S. District Court for Arizona, on July 1, 1917, the Association suing on its own behalf, and the plaintiffs Theilmann and Donovan suing on their own part, and on behalf of certain classes of landowners similarly situated to each of them, respectively; the complaint (Trans. Rec. p. 1 et seq.) setting out, among other matters, the Federal question involved; the rights of the plaintiffs in the lands involved; the power of the defendants

to irreparably injure the plaintiffs and their lands, because of their employment and control over the life-giving waters; the examination of and making of surveys upon the lands involved, under the Reclamation Act, by the Secretary of the Interior; his determination, upon full advice from the necessary maps, plans and estimates of cost, of the feasibility of the project, and the charges per acre—the ESTIMATED COST, at $35.28 per acre, on May 10, 1904; the setting aside of $3,000,000, in the Reclamation Fund for the construction of the project; the giving of the Public Notice as required by Sec. 4 of the Act; that the plaintiffs and their predecessors in title, and those for whom they sued, relying upon the determination and estimates of cost so made by the secretary, and the promises of the engineers, mortgaged their lands to secure the payment of the $35.28 per acre, which they otherwise would not have done; and that they would not have done so unless they believed in and relied upon the promises, express and implied, that the project was to be completed as a whole, and not as Tract C only; set forth the uncompleted condition of the project as a whole, set out the contract of May 31, 1906, in full (Trans. Rec. 41) and also appended a sample copy of the proposed Water-Right Application (p. 48 Trans. Rec.) which the defendants threatened to compel them to sign; showed the nature and extent of the irreparable injury threatened, unless plaintiffs should promise to pay $75 per acre construction charg, instead of $35.28, and to commence paying the $75 per acre on Dec. 1, 1917, when the project could not possibly be completed; and prayed for preliminary

and permanent Mandatory Injunctive relief, so that water would be supplied to plaintiffs' lands.

7. A Temporary, Mandatory Injunction was granted on July 6, 1917, compelling the defendants to serve water to certain of the plaintiffs who needed Summer water. At the end of 1917, by stipulation in open court, it was agreed that water should be furnished to all water users in Tract C, on their paying the operation and maintenance charges, until the final determination of the suit in the Trial Court, which remained in effect till the Final Decree on Feb. 26, 1920, which was against the plaintiffs on all points; but the Supersedeas Order of the Trial Court (Trans. Rec. pp. 566) provides for the supplying of water to the plaintiffs during the pendency of the appeal to the Circuit Court of Appeals, upon their paying the back construction charges from Dec. 1, 1917, at the rate of $40.00 per acre, the amount contended for by the appellants; which arrangement has been continued in effect by the Supersedeas Order of the Circuit Court of Appeals (Rec. p. 661).

8. During the Summer of 1917, by stipulation, the plaintiff Griffin was brought in as a plaintiff, on his own behalf and as representative of the water users in Tract A.

9. The plaintiffs were permitted to further amend their complaint at the commencement of the trial, April 28, 1918 (Trans. Rec. pp. 58 and 142), whereby the corporate plaintiff is suing herein specially for a large class of its constituent members who are homestead entrymen, who at divers times between May 10, 1904, until April 6, 1917, made

homestead entries of 160-acre (or less) tracts, and who are threatened with reduction in area of their holdings to a 40-acre farm unit, through the defendants refusing to furnish water for a larger area to any of that class of landowners. While, as heretofore pointed out, practically all of the lands involved were in private ownership when the project was launched, a large area was held by homestead or desert land entries, unaffected by the provisions of the Reclamation Act; and owing to the slow progress made in the construction of the project, extending over 12½ years, large numbers of entrymen were compelled to, and did, relinquish their entries, and, the lands being, from about July 1, 1902, withdrawn from all form of entry except as homesteads under the Reclamation Act, the new entrymen were compelled to re-enter subject to all the limitations, etc., of that act; and while on May 10, 1904, there were only a few scattering 160-acre tracts subject to these limitations, etc., by April 6, 1917, there were some 6,000 acres in Tract C alone which had been re-entered, and subject to the limitations, etc., of the Reclamation Act, the holders of which are threatened with reduction of area.

10. During the progress of the trial the defendants were permitted to introduce in evidence, over the objection of plaintiffs, their Exhibits 3 and 4 (Trans. Rec. 396-8); all dated subsequent to the commencement of this suit; and the principal witness for the defense, Director Davis, showed on cross-examination, without objection (Trans. Rec. p 446) that in 1918, long subsequent to the institution of this action, Imperial Irrigation District,

a California municipal corporation, supplying irrigation water from the Colorado River to large areas of land in California, entered into a contract with the United States to pay $1,600,000 for use of the Laguna Dam, the principal work of the Yuma Project; and the plaintiffs, as viewed by the witness, were not entitled to any credit on their construction charges because of that payment when made. Plaintiffs asked leave to file a supplemental pleading setting up those two sets of facts (Trans. Rec. p. 136-40) which was denied (Rec. 542). Testimony tending to show that the Secretary of the Interior made some oral promises as to the allowance of the $1,600,000 as a credit was admitted under Equity Rule 46 (Rec. 537 et seq.).

11. The contract in question originally provided for the payment of the construction charges in ten annual installments; which has been changed by operation of the Twenty-year Extension Act (Aug. 13, 1914, 38 Stat. 686); the plaintiffs accepting its terms as to time and rate of payment, with the consent of the Secretary of the Interior, and without prejudice to any rights here involved.

12. The defendants below objected to the jurisdiction of the Court, by moving to dismiss on the ground that the suit was reallly against the United States. This contention was overruled—on the authority of Magruder vs. Belle Fourche, 219 Fed., 72, and the cases there cited.

13. In the trial below defendants objected to practically all of plaintiffs' evidence (except the corporate plaintiff's Articles of Incorporation), and to each and every item thereof, on the general

grounds, only, of irrelevancy, immateriality and incompetency; but the evidence was heard subject to the objections to be later ruled upon. No such ruling was made, but in the consideration of the case the Trial Judge "admitted and carefully considered" all of plaintiffs' evidence (Trans. Rec. p. 561). The plaintiffs, in Sec. a of Par. 23B of their Complaint (Trans. Rec. p. 24) alleged that in any event, the charge of $75 per acre was grossly exorbitant, more than the works are worth, and more than the land could bear, one year with another; but in the trial of the case did not first proceed on that theory, but rather on the theory that whatever the works cost, or whatever they were worth, and whether the land could bear the charge or not, everyone was bound by the determination of the Secretary of the Interior made on May 10, 1904, fixing the charges at less than $40 per acre. But in the cross examination of plaintiffs' principal witness, Bondesson, the defendants were permitted, over the objection of plaintiffs, to draw forth testimony tending to show that lands were amply able to bear the burden of $75 per acre; and before closing their case plaintiffs offered to prove the allegations Sec. a, Par. 23A, of the Complaint (Trans. Rec. 371). The offer was refused, and error is predicated thereon.

14. THE QUESTIONS INVOLVED, assuming the jurisdiction of the Court, in the order of their importance, are:

a. Did the Secretary of the Interior in May, 1904, in accordance with Sec. 4 of the Reclamation Act, determine the ESTIMATED COST of the

Yuma Project at less than $40.00 per acre, thereby irrevocably fixing the charges per acre so that no higher charge could be enforced, as contended for by appellants; or, was the cost of the project determined by a public notice issued by another secretary, 13 years later, fixing it at $75.00 per acre, which must be paid, as appellees contend? Or, in other words, is the Estimated Cost to be paid, or shall there be paid the actual cost, or rather some arbitrary amount fixed by the Secretary of the Interior in his discretion, which is neither the estimated nor the actual cost?

b. Is the contract of May 31, 1906, ambiguous or unambiguous; and did the appellants' by entering into that contract waive and barter away their rights under the Reclamation Act; and must they pay for the project such charges as the Secretary of the Interior shall arbitrarily determine; notwithstanding that the law says that the Estimated Cost shall be returned?

c. Whatever the cost to be paid, $40, or $75 per acre, has the time arrived to pay the first installment thereof; in other words, have "the proposed works" been completed within the meaning of the contract?

d. In any view of the case, even though the Appellees may be right in all other contention, is it not inequitable and unjust to compel the appellants to execute and deliver the Water Right Application, the blank form of which is annexed to the complaint as Exhibit D (Rec. 48)?

e. May the Secretary of the Interior, after a homestead entryman has made entry of a full

quarter section of land, paid the fees and commissions thereon to the Receiver of the U. S. Land Office and fully complied with the homestead laws, offered and had accepted his final proof, and held the 160-acre tract for more than ten years, compel the entryman to reduce his area to one 40-acre farm unit, and to part title with the other three forties; and did the Lower Court err in ignoring that subject in its decision?

f. Did the Trial Court err in rejecting, admitting, and refusing to strike, certain evidence?

g. Did the Trial Court err in refusing to permit the plaintiffs to make a supplemental trial amendment of their complaint; and thereby preclude the plaintiffs from setting up, among other matters, an equitable setoff in the sum of $1,600,000?

h. Did the Trial Court err in finding and deciding certain facts to exist, contrary to the evidence?

i. With the general question, of course, did the Trial Court err in denying the relief prayed for; and did the Circuit Court of Appeals err in sustaining the Trial Court?

15. THE LAW APPLICABLE TO THIS CASE: a. The first and principal question—what shall be paid for the project, $40 or $75 per acre—will be answered by the interpretation and construction of Sections 2, 3 & 4 of the Reclamation Act (which, for the convenience of the Court are set forth at page 101 infra): b. The second question, as to whether the contract of May 31, 1906, is ambiguous or unambiguous, and if thereby the Appellants waived their rights to have collected from them, as the cost of the project, only the Estimated Cost,

rather than the actual cost, or the cost as arbitrarily fixed by he Secretary of the Interior, will be answered through the application of the ordinary rules governing the construction of contracts; the universal rule that the law is written into all contracts; and the express term of the contract itself that in all relations between the parties the rights of the Appellants are to be defined, determined and enjoyed by and under the Reclamation Act. c. The third question as to when the payments for the project should commence, whatever their amount, will be answered by determining if "the proposed works" have been completed within the meaning of the contract of May 31, 1906; after first determining what "the proposed works" are. d. The fourth question as to whether or not, in any view of the case, the appellees were not proceeding unlawfully, and inequitably and unjustly in attempting to compel appellants to execute and deliver the Water Right Application, will involve the scanning of the Reclamation Act and all amendments thereto, to ascertain if there is authority vested in the Secretary of the Interior, or any of his employes, to compel a land owner within a Reclamation Project to give away his property without compensation, under the guise of procuring a water-right application: e. The fifth question as to the right of the Secretary of the Interior to reduce in area the entries of the homesteaders, will be answered by the construction of Section 3 of the Reclamation Act; and a consideration of the acts of the Secretary thereunder; and, if he had not finally and conclusively acted long before the issuance of the Pub-

lic Notice of 1917, his long delay in acting at all, meanwhile permitting the entrymen to hold the maximum area. The other questions are to be solved by the ordinary Rules governing the trial of Equity cases.

All those questions were raised by objections and exceptions in the Trial Court; the successive appeals, and, now, the following:

SPECIFICATION OF ERRORS

First.

Appellants charge and allege that the United States Circuit Court of Appeals, for the Ninth Circuit, erred in affirming the Judgment and Decree of the United States District Court for the District of Arizona, for the reason that said District Court committed manifest error in the Trial of said cause, and in rendering and entering its judgment and decree in said cause, upon the following grounds, to-wit:

1.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Oscar P. Bondesson: (Trans. Rec. pp. 290 to 296).

"I farmed all the area of the land, and I grew alfalfa and grain crops, such as feterita, barley and cotton. My place is now rented.

"I rent my land for $30 cash per acre per year, and the lessee pays for the maintenance charge. I get for the rent of the land itself, and if there are any construction charges I pay them, but not the annual maintenance. I pay also my dues to the Water Users, which are nominal, very small, and taxes, annually. I am not paying a construction charge at the present time, as I am one of those who took advantage of the situation and made a temporary application for water service pending the determination of this suit."

"1916 was a year of large prices for produce. Cotton was beginning to be a pretty good price. As I remember it, I pastured my alfalfa lands in 1916, and received a gross revenue of close to thirty dollars per acre. That was gross.

"That was as to alfalfa, about one hundred acres or less was in alfalfa that year, and it brought me, as I remember it now, I little less than thirty dollars. It was pastured throughout the year to cattle.

"I am familiar with the regulations and actions of the Reclamation Service in securing crop returns every year; they used to come around for that purpose. I don't remember of having made any directly to them for the last two or three years, however, but I do remember that, say, three or four years ago they used to come around for that purpose. The water master used to come and ask about these things generally. I think that once or twice I made out those returns upon the regular card and furnished them to them. The card that you show me discloses that it is my card and in my handwriting, and that the returns for my land per acre for the year 1916, according to this card, was practically thirty dollars per acre for the alfalfa in round figures. There were sixty acres of cotton and seed. The gross return is shown to be $8,640 for cotton, $1,400 for cotton seed; in round numbers $10,000 for the sixty acres, gross return. The entire ranch would be a gross return of $13,000. The average value per acre stated to be $81.50.

"I do not recall the figures for the returns upon my place for the year 1917, but it was as large as that, if not a little more. 1917 was an exceptionallly good year on account of high prices, and in 1918 I received thirty dollars an acre rent. It was rented in 1918 and is now rented; the entire 160 acres for thirty dollars per acre for 1918 and for this year. The lease runs for three years, which is practically net to me, except taxes, interest on the investment and that sort of thing. I have no figures for the year 1915. The returns were very much less, however, than in 1916. In 1915 prices were just beginning to advance. I had no cotton in 1915, and that has been the big money crop really. I had alfalfa and grain crops, but it was a paying proposition in that year"

for the reason that all of said testimony was irrelevant and immaterial, and not proper cross-examination, and the nature and extent of the crops raised or not raised by the witness Bondesson in the years 1915-16-17-18 on his land within the Yuma Project, and whether or not such crops, if any, were raised at a profit or at a loss, and whether or not the witness Bondesson rented his said land for the years 1918, 1919 and 1920 at the sum of thirty dollars an acre, net, or whether he rented it at all, or not, could not, and did not, throw any light upon the questions involved in this case and the issues set forth in the pleadings, and did not tend to prove or disprove whether or not the Secretary of the Interior in the year 1904 made examinations and surveys for the location and construction of the Yuma Project! and whether or not said secretary determined that the Yuma Project was practical, and let contracts for the construction of the same; and whether or not he gave public notice as required by Section 4 of the Irrigation Act of June 17, 1902; and whether or not he estimated and determined at that time the cost of said Yuma Project and that such testimony could not, and did not, tend to prove or disprove whether or not the contract of May 31, 1906, annexed to plaintiff's complaint as Exhibit C, and introduced in evidence as defendants' Exhibit 7, was ambiguous; and did not tend to prove or disprove whether the project or the proposed works mentioned in said contract was completed April 6, 1917, or at the time of the trial; and for the further reason that the questions drawing forth said testimony were not proper cross-examination, the witness not having been interrogated by the plaintiffs as to any time or circumstances later than the year 1906, and said witness not having been interrogated as to what, if any, disposition he had made of his lands in the years 1915, 1916, 1917 and 1918, or at all; to all of which ruling of the Court in overruling plaintiffs' objection to said testimony and in admitting the same plaintiffs duly excepted to at the time.

2.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Oscar P. Bondesson (Rec. pp. 301-2):

Land had a value at that time of—well, it would depend on what state of cultivation it was in, or whether it was clear or level. I would say raw land at that time was worth about around twenty-five dollars up. As to cleared land it would depend upon the amount of labor that had been expended on it. Raw, unimproved land was worth right around twenty-five dollars and up on May 28, 1904.

for the reason that the value of lands within the Yuma Project on May 28, 1904, or whether they had any value at all, or not, was irrelevant and immaterial, and did not tend to prove or disprove any issues in this case, and the questions drawing forth said testimony were not proper cross-examination, for the reason that plaintiffs had not interrogated said witness as to the value of his lands, or any other lands, within the Yuma Project in the year 1904; and for all the other reasons set forth in the preceding Division No. I, which said objections are not, for the sake of brevity, here repeated, and it is prayed that reference may be had to said Division No. I, for a statement of said objections and wherein the Court erred in admitting the testimony set forth in this assignment of error; to which ruling of the Court in overruling the plaintiffs' objection to admitting said testimony, the plaintiffs duly excepted at the time.

3.

That said District Court erred in not granting plaintiffs' motion to strike all the testimony of the witness Bondesson set forth in the two preceding Divisions Nos. 1 and 2, for the reason and upon all the grounds set forth in the two preceding Divisions, Nos. 1 and 2, which are

hereby referred to and made a part of this Division, said grounds and reasons not being set forth here in full for the sake of brevity; and it is prayed that refernce may be had to said Divisions for the reasons in support of this Division; that plaintiffs now except to the refusal and failure to strike said testimony from the record plaintiffs' said motion to strike not being passed upon during the trial of this case, or at all, except in effect by the final decree dismissing plaintiffs' bill of complaint.

4.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, (Rec. 369-71) to-wit:

"Mr. Molloy: The plaintiffs offer to prove, and hereby avow their readiness and ability to prove by the testimony of numerous witnesses to the number of at least twenty, in addition to the testimonies of plaintiffs' witnesses hereto examined, that plaintiffs' exhibit 15 for identification, the certain pamphlet testified to by the plaintiffs' witnesses heretofore examined, was generally circulated amongst all of the landowners within the Lower Colorado Irrigation District on May 28th, 1904, and continuously thereafter until ninety-eight per centum of all of the land within the Lower Colorado Irrigation District had executed subscriptions for the capital stock of the plaintiff corporation by executing subscriptions for the capital stock of the plaintiff corporation by executing, acknowledging and delivering, each of them, an instrument similar in tenor and effect to the sample form thereof offered in evidence as plaintiffs' exhibit 14; and that at the mass meeting held in the town of Yuma, Arizona, on the night of May 28th, 1904, testified to by plaintiffs' witnesses heretofore examined, F. H. Newell, Chief Engineer of the U. S. Geological Survey, and J. B. Lippincott, Supervising

Engineer of U. S. Geological Survey, and each of them, stated and represented to the landowners assembled at said mass meeting, that they, the said Newell and the said Lippincott, and each of them, represented and there spoke for and on behalf of the Secretary of the Interior of the United States of America, and that the written statements and representations set forth in said exhibit 15 and the plat and drawings annexed thereto, were true and correct and could be relied upon, and that the Yuma Project as therein described and thereon delineated could and would be constructed, as a whole, within two years from the actual commencement of work thereon, at a cost of not to exceed $35.00 per acre, and possibly less, and that they, and each of them, the said Newell and the said Lippincott, would pledge, and did then and there pledge, their professional reputations as engineers, such as it was, that said project could be and would be so constructed within said time, and at said cost; and that each and all of said proferred witnesses, and each and all of the landowners present at said mass meeting believed in and relied upon the statements so made by these said engineers, and relied upon the statements, representations and delineations contained in said pamphlet, and the said land owners, and the said proffered witnesses, and each of them, were thereby induced to, and did, execute, acknowledge and deliver to Yuma County Water Users' Association, the plaintiff corporation, their subscriptions for stock identical with plaintiffs' exhibit 14, thereby placing a lien upon their land to secure the payment of the estimated cost of said project; and that if said witnesses, or said landowners, or either of them, had known or could have foreseen that the cost of said project would have exceeded the sum of $35.00 per acre, or, at the extreme outside, the sum of $40.00 per acre, and that said project would not be completed within two years from the time of commencement of work thereon, that they would not, nor would either of them, have executed or delivered said stock subscription agreements."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. 504-5).

5.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence (Rec. 371-2), to-wit:

"Mr. Molloy: The plaintiffs' offer to prove, and hereby avow their readiness and ability to prove by the testimonies of numerous witnesses, not less than twenty-five, that the charge of $75.00 per acre provided for in the so-called public notice of April 6, 1917, concerning said Yuma Project, an unjust and inequitable burden upon the lands within said Yuma Project, and the owners thereof, and that said owners cannot afford to pay such charges, the same being more than said lands will bear, one year with another, taken over the period of time provided for the payment of the annual installments of the construction charge of said project; and that the same is, and will be, excessive, unjust and grossly exorbitant, and out of all proportion to, and greatly in excess of the actual value of the works constructed, or to be constructed, in said Yuma Project, for the irrigation and reclamation of said land; and that the charge of the sum of $1.50 per annum, for each acre of the land within Tract C, as described in the complaint, as a minimum operation and maintenance charge is, and will be inequitable, unjust, illegal, arbitrary, excessive and unreasonable and greatly in excess of the reasonable cost of the operation and maintenance of said project."

to which ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the

plaintiffs then and there duly excepted. (Trans. Rec. 504-5.)

6.

That said District Court erred in rejecting the following evidence offered by the plaintiffs, and in refusing to permit the plaintiffs to make the proof contained in the following offer of evidence, to-wit:

"Mr. Molloy: Plaintiffs' offer to prove that there is within the limits of said Lower Colorado Irrigation District, as described in the complaint, some six thousand acres of land which was, on May 10, 1904, in private ownership, although within the exterior limits of certain withdrawals under the second form of withdrawal, according to the provisions of Reclamation Act of June 17, 1902, and of which said lands were thereafter, and prior to the commencement of this suit, relinquished to the United States and re-entered by homestead claimants under said Act, in tracts of 160 acres, and of other areas greater than 40 acres, for which the Register and Receiver of the Phoenix, Arizona, land office, received and accepted the fees required by law for the entry as homesteads and of said respective tracts so re-entered, and that said new entrymen have been permitted by the Secretary of the Interior to hold all of the areas so re-entered as homesteads without diminution or confirmation to a farm unit for a great number of years in each of said respective cases, to-wit: The period of ten years, including John W. Hevener and his homestead entry for the northwest quarter of Section 17, Township 10 South, Range 24 west, G. & S. R. Meridian, in Yuma County, Arizona, and many others similarly situated to said Havener."

to which said ruling of the Court in refusing to permit said proof and of the rejecting of said offer of evidence the plaintiffs then and there duly excepted. (Trans. Rec. p. 504-5.)

7.

That said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of the witness Arthur P. Davis. (Trans. Rec. 379 to 385).

"Briefly, the reasons for the additional cost of the project were three: The first is the unexpected conditions that developed as to poor rock and some other physical conditions; the difficulty in dealing with the rivers which were then not so well known as now, and other minor physical difficulties. Second, the change in industrial conditions which was very important. There was a very rapid increase in the price of labor, price of material, and especially in the scarcity of efficient labor. That was one of the chief difficulties the contractor had which led almost to his ruin and calamity in October, 1907, when there was an industrial collapse. It had been greatly hastened by the destruction of San Francisco, which in its building in 1906 and 1907 absorbed building materials and labor which affected greatly the western part of the country. The conditions were generally changed, the plans were changed in order to make a better project and more endurable project, one of the features being substitution of the siphon under the Colorado River for one under the Gila, which was decided upon for the reasons there were very grave doubts of maintaining such a crossing on the Gila River The original plans provided that the main canal which was to serve the entire Arizona side of the project, including the Lower Yuma Valley, should be built on the Arizona side and it involved a crossing of the Gila River and a large mileage of the canal in the valley of the Gila River where it might be attacked by that stream when in flood, and if reached would deprive the entire lower valley and a portion of the upper valley of any water for irrigation and in a high, arid climate of this kind that was a very serious jeopardy. Largely to avoid that jeopardy the crossing plans were changed and the

main canal was finally built on the California side and the portion to water the lower Gila Valley was brought through a siphon under the Colorado River just below the city of Yuma. Another change was that a very much larger mileage of canals was built than was shown on the plat which has been placed in evidence here; approximately, I think, four times the mileage, although the increased mileage was of small conveyance merely. And it is those canals that contain a large number of small wooden structures. The main structures on the Yuma Project being of a permanent nature. That policy is one which we have developed with the experience of surveys, and observations of other works, as being the wise one. Technically there was no change in hours of labor.

The law was not changed. The original Reclamation Act contains a paragraph requiring eight hours to constitute a day's labor for a common labor—labor of mechanics, but it was a practice in those days for contractors to make agreements with their men and work them ten hours and they probably made their bids on that basis. At any rate that was the practice and J. G. White & Company began that practice and carried it on for some time and were arrested by the local authorities and I understood paid a fine and had to discontinue it and work men eight hours. They had great difficulty in securing labor which was one of the strongest items involved in the increased cost of the Laguna Dam, and another cause the increased difficulty of navigating the Colorado River. The contractors began, I believe, first to do some freighting on the Arizona side and found that the Gila River interrupted his traffic frequently, or for other reasons he changed to the river for navigation, but the Colorado River broke into Imperial Valley and began cutting its channel very rapidly and the effect of that cutting reached back well into the Yuma Valley. I mean cutting the bottom lower and lower. The river in its former position reached sea level and at the Gulf of California, something over a

hundred miles below Yuma, and by changing in approximately the same distance or perhaps a less distance, reached an elevation practically two hundred and fifty feet lower than sea level, so that it had a very great declivity. It cut great, deep gorges through the Imperial Valley and caused cataracts which were undermined by the high velocity causing deep gorges. The effects of that reached up, I don't know how far, but above the city of Yuma. I know that from my experience in navigating the Colorado River. Prior to that cutting the Colorado River was being navigated to the Laguna Dam and above, after the cutting I found it impossible to so navigate it. It formed a series of rapids which prevented the passing of the boats. I know for I was on a boat with a good pilot that could not pass, and we spent many hours there. That and other difficulties led to the abandonment of the navigation of the river and to the construction of a wagon road on the California side by which considerable freight was hauled to the dam. Those three methods, a road on the Arizona side, navigation of the river and a road on the Colorado side, were the methods that had been used for freighting to the dam during the pendency of the work of the contractor—during the progress of the work of the contractor at the Laguna Dam. There was no railroad constructed by the contractor. When the Government took over project upon the failure of the contractor, the experience therefore had by him demonstrated that those methods of transportation were not only enormously expensive but ineffective, and had contributed largely to his loss and at last it was decided that a railroad must be built and such a railroad was built under the auspices of the Government. That railroad is in existence and is used for occasional travel, for hauling rock from the Colorado River to the dam and maintenance of levees in the lower valley and upper valley, also for taking such material as required to the Laguna Dam.

The effect of all these things was to greatly increase the cost of the dam under any management, irrespective of the cost of management. Other portions of the project were affected in the same way:

for the reason and upon the ground that it was irrelevant and immaterial what the actual cost of the Yuma Project was, or should have been, the Secretary of the Interior having, in the year 1904, under the provisions of the Reclamation Act of July 17, 1902 (32 Stats. 388), determined the estimated cost of the Yuma Phoject, and said act providing that such estimated cost and not the actual cost should be returned to the Reclamation Fund, and it will now be inequitable and wrongful, after the plalintiffs in this case, and those for whom they sue herein, have mortgaged their lands to secure payment of the estimated cost, as so fixed and determined by the Secretary of the Interior and not the actual cost, to permit the defendants, thirteen years after the cost of the Yuma Project has been estimated according to law to levy on the lands of the plaintiffs, and those for whom they sue, a charge of more than double the estimated cost; to which ruling of the Court in overruling plaintiffs' objections to said testimony and in admitting said testimony the plaintiffs duly excepted at the time.

8.

That said District Court erred in admitting, over the objections of the plaintiffs, the following testimony of the witness Arthur P. Davis: (Trans. Rec. 385-391.)

At the time of the meeting of May 28th, 1904, there were no surveys or locations of anything that anybody regarded as permanent. There were approximate locations of some features. The principal feature of that character being the Laguna Dam, but even that was subject to change, not only in location but design, and was subsequently changed in design and I think in

location. There was not at the time a definite determination of the irrigable area in Lower Colorado Irrigation District.

It was the area in which we were endeavoring to work out and had tentatively worked out a feasible irrigation project in which we had made an attempt to approximate the acreage that could be covered and the works that would be necessary for that and their probable cost.

Since May 31, 1906, the irrigable area of the project has been determined approximately.

The area of the so-called north and south Gila Valleys, also referred to in the complaint as Tracts A and B of the Lower Colorado Irrigation District, were withdrawn from entry in the early days, but have since been restored to entry, the purpose of the withdrawal was to prevent prior entry before the proper time, pending examination and the determination of the feasibility of the project and the final action even if not feasible. The purpose of the restoration was the last step in the abandonment of that part of the project as far as irrigation was concerned by this project.

The Court: In other words, when you determined it was not practical to irrigate they were restored to entry?

Witness: Not immediately. It is a custom of the Irrigation Service to not restore lands while there may be danger of people being misled into filing upon the land and we have frequently held lands beyond the time of the actual needs of the act for that reason.

The Court: In any event you determined it was not feasible to include them within the project?

A. Yes, and that was the purpose of the restoration. the reason for it.

As to the North and South Gila:

This map has upon it in dotted lines the course pursued at various times by the Colorado River and the Gila River. That color in yellow shows the course of the Colorado River in 1903 and the course of the Gila River along the lower line. The red line indicates the

boundary and the course of the Colorado River in the upper part and the Gila River in the lower part of 1907; and the various dotted lines show the various peregrinations and meanderings of the rivers in the early days. Now this shows that in 1903 the Colorado River ran along the yellow line which is far to the north of where it afterwards came and by its cutting to the southward, it cut off the land which has been intended to be occupied by levees and the canals. At the same time the meanderings of the Gila River showed its erratic disposition and also the Gila was a much more difficult river to control than the Colorado for the reason the Colorado rises slowly and gives warning. That is not true of the Gila. It also in extreme floods discharges more water and at a higher velocity than the Colorado. For those reasons it is far harder to control the Gila than the Colorado. That is the principal reason for this change. Another is—

The Court: Where is that land in question?

A. It is this area in here (indicating on map).

The Court: Omitted from the project?

A. Between this river and the Yuma mesa (indicating on map).

The Court: You were asked to state why it was not practical to include that in the project as originally planned.

A. One reason is the impracticability of controlling the Gila River by means of levees. Without levees these valleys will all overflow and their cultivation will be so precarious that we don't consider it feasible for the part nearest the river. Some of the higher lands may be cultivated but only a very small area for the same reason of the erratic condition and impracticability of controlling the Gila River within the limits of expense, which made it necessary to bring the main canal of the Yuma Project down the river from the Laguna Dam.

Removing the main canal to the western side of the river, or the location of it before the construction, and

crossing the Colorado River was due largely to this impracticability of controlling the Gila River so not to wipe out the crossing.

The Court: Was it ever contemplated that you would control either one of these rivers with levees?

A. Yes. Levees have been built in the valleys and this levee on the eastern bank of the Colorado is still in existence.

The Court: Do you mean the levees here (indicating on map)?

A. In a general way it is parallel with the river, but the original location of that levee has been obliterated and the present course is shown on the map and marked "Levee."

The Court: This levee here along the red line?

A. No, the levee is along the Gila land shown on this map. Every time that river goes in flood it changes some part of its course and frequently very radically. Now, the removal of the main canal to the west side of the river which was necessitated by the erratic habits of the Gila River, made it impossible to cover by gravity as large an area for the reason that a canal with very large discharge requires much less grade than a canal of small discharge so that a canal on the smallest practical grade and with a capacity proper for the irrigtion of irrigable land in the Gila Valley follows a course roughly parallel, but lower than the original main canal and crosses the Gila river in the neighborhood of Sections 16 and 21. I have another map with the course sketched; that blue line (indicating on map). The blue line on this map shows the approximate location of the canal headed at the Laguna Dam carrying sufficient water for the two Gila Valleys and reaching to the neighborhood of Yuma. It leaves out a large portion of the upper part of both valleys; a portion of the North Gila Valley having also been eliminated by the changes in the Colorado River reduced this acreage to only thirty-five hundred that can be irrigated by gravity. That area can be reached by pumping. That

so radically changed the areas, on the basis of our knowledge in 1904, that in my opinion the system is not a feasible system.

Another reason is one developed since that date. We found that the Colorado River passes freely under the levee and at the time of high waters appears on the surface, so that the construction and maintenance of levees does not protect them from overflow. It makes it necessary if they are to be irrigated to provide them with drainage canals of very large capacity, the water from which must be pumped into the river. We have had a very expensive and serious experience on the opposite side of the river, and where the Secretary of the Interior in an effort to do justice has allowed the people to abandon their claims and take up under preference homesteads in the lower Yuma Valley in exchange. And they have suffered serious loss.

for the reason and upon the ground that such testimony is irrelevant and immaterial as the examinations and surveys of the Yuma Project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma Project, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, determined the feasibility and practicability of said Yuma Project, and all thereof, including the North and South Gila Valleys, described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter duly let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then or on April 6, 1917, feasible and practicable is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determintion of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine

and estimate. And upon the further ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witness was an attempt to vary the terms of said written instrument by parole. And for the further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plan and surveys themselves were the best evidence; to which ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plainitffs duly excepted at the time.

9.

That said District Court erred in admitting, over plaintiffs' objections, the following testimony of the witness Arthur P. Davis (Trans. Rec. 401-2):

Witness: We began the construction of the drainage canal in the lower valley some time ago. I don't remember how long ago—over two years—and immediately a protest was set up by the people in the valley against it, whose judgment was, it was not needed. Written objections were made to the Secretary of the Interior and referred to me, and written objections were made to me personally and I requested and urged to go to the Yuma Valley and hear representations on the subject, and I was there in Yuma visited by a large representation of the farmers of the Yuma Valley, most if not all of whom were members of the Water Users' Association and some I believe were officers thereof. They presented me with a stack of cards, and a petition in strong terms requesting that the drainage be stopped and abandoned, and very strong representa-

tions were made to me at the same time to the same effect, and we at that time had two dredges in the valley, one was at work and the other about to be put to work. I was of the opinion that the time for beginning had arrived; that something had already developed and it might be carried forward slowly and it was my intention to have two dredges there and perhaps order others if needed, but owing to those protests, having already started one dredge, we confined our operations to one dredge, and in this meeting I explained the operation with the idea that when we got to a certain point in the valley we would stop.

for that reason that said testimony is hearsay; to which ruling of the Court in overruling plaintiffs' objections to said testimony, and in admitting the same, the plaintiffs duly excepted.

10.

That the said District Court erred in admitting, over the objection of the plaintiffs, the following testimony of Arthur P. Davis (Trans. Rec. 404-7):

Assuming that the public notice of April 6, 1917, had been postponed until the completion of the piece of drain referred to by the witness Bondesson, the drainage system would not even then be completed. I think it will not be in my lifetime that no more drainage will be necessary. The mere building of the main drain is but an important start on that work. The construction of the main drain will by no means involve the drainage problem in Lower Colorado Valley. If the extra piece of drain referred to by Bondesson were completed, something else would arise—speculative, it is true. As a whole the project is in a completed condition in the Lower Colorado Valley, as a practical matter, in the only sense in which it is completed, or ever will be completed, and that state was arrived at a considerable time before the issuance of the public notice of April

17, 1917. By a practical matter I mean that the delivery of water, and the facilities for the delivery of water and irrigating and cultivating land are excellent and hard to beat; that the drainage has been kept close up to the limit of practical economical construction, and that no considerable portion of the land in the lower valley, as irrigation projects go, has ever been impractical of cultivation or irrigation by reason of delay of drainage. There probably—not be any additional drainage necessary:

for the reason and upon the grounds that said testimony was irrelevant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma Project as set forth and described in the contract of May 31, 1906, annexed to plaintffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit; to which ruling of the Court in overruling plaintiffs' objection to the admission of said testimony, and in admitting it, the plaintiffs duly excepted at the time.

11.

That said District Court erred in admitting over the objections of the plaintiffs the following testimony of the witness Joseph B. Lippincott (Rec. 606):

Q. Now what you have stated is all you have to base your opinion upon that the Yuma Project is finished?

A. No, sir; no, sir.

By the Yuma Project I mean the Yuma Project as finally adopted by the Secretary of the Interior. The fact that the Yuma Valley is a going business, going farming community, the fact that the lands are highly

improved, the fact that the whole unit shows the successful operations of farming in that valley, paved roads and good houses, and fields under intensive cultivation, the fact that the farmers of this region are apparently able to successfully carry on farming operations under irrigation. In fact, the Yuma Valley presents to me one of the most prosperous and successful farming demonstrations that I have seen in this country. I would say as far as the cultivation of lands by irrigation in this Yuma Valley is concerned that the project was finished. There doubtless will be many things to do in the future. I doubt if the time will ever arrive—not arrive in my lifetime, when construction work is no longer necessary in the Yuma Valley, just as the time never seems to arrive when the construction work on these big transcontinental railroads has reached their final completion, and the project is a finished project in my judgment in that the landowners of that community are able very successfully to carry on the business for which that project was designed

for the reason and upon the grounds that said testimony was not responsive to the questions asked and was not within the scope of the cross-examination of the witness, and such testimony did not tend to prove or disprove whether or not the proposed works of the Yuma project mentioned in the contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed, and the evidences of prosperity testified to by said witness is no evidence whatsoever that the Yuma Project was completed as a physical fact; to which ruling of the Court in overruling plaintiffs' objection to said testimony, and in admitting it, the plaintiffs then and there duly excepted.

12.

That said District Court erred in denying plaintiffs' motion to strike from the record the testimony of the

witness Joseph B. Lippincott, set forth in the preceding Division No. 11, to which reference is hereby made for the sake of brevity, for the reasons and upon the grounds set forth in said preceding Division, which reasons and grounds are not herein set forth for the sake of brevity, but it is prayed that reference may be made to said Division; to which ruling of the Court in denying said motion the plaintiffs then and there duly excepted. (Rec. p. 490.)

13.

That said District Court erred in refusing at the close of the evidence in the trial of this case, to grant leave to the plaintiffs to file a supplementary pleading herein in words and figures, as follows, to-wit: (Trans. Rec. 542-3).

(Title of Court and Cause)

(Trans. Rec., p. 138)

Plaintiffs complain, and allege, and respectfully show, the Court, that, as plaintiffs are infromed and believes, since the commencement of this suit and in the summer of 1917, the Secretary of the Interior did make certain orders whereby he purported to declare and determine that the Yuma project or Reclamation Service as embraced within the lower Colorado Irrigation District, as described in the complaint, was then and there completed and finished, notwithstanding that certain portions thereof, to wit, tracts A and B, as set forth, described and delineated in the complaint, had not been in any manner physically reclaimed, as more particularly set forth in said complaint, and notwithstanding that the drainage system of Tract C, as described in the complaint, had not been completed; that as plaintiffs are informed and believe, the said orders so made by the Secretary of Interior, were made for the purpose of affecting the ultimate adjudication of this suit, and were made by the Secretary of the Interior without due and

proper investigation, and without jurisdiction, for the reason that the Secretary of the Interior had, many times from the year 1904 until the end of the year 1916, declared and determined that said portions of the Yuma Project were feasible, practical and advisable, and in fact said portions were, at the time of making said orders and each of them, feasible practicable and advisable of construction as originally planned and determined by the Secretary of the Interior in the year 1904; and the Secretary of the Interior was not, in the Summer of the year, 1917, in possession of any facts or information that would justify the making of said orders, or either of them; and that the making of said orders was without the jurisdiction of the Secretary of the Interior, and in violation of the letter and spirit of the contract entered into between plaintiffs corporation and the United States of America, on May 31, 1906, a copy of which is annexed to the complaint herein as an exhibit and the said orders, and the making thereof, was and is an abuse of any and all discretion vested in the Secretary of the Interior by law, or at all; and it would be inequitable and unjust to permit the defendants in this case to deprive the plaintiffs herein of the use of irrigating water in the manner described in the complaint, or at all, because of the making of said orders.

2. That, as plaintiffs are informed and believe, in the year 1918, and subsequent to the commencement of this suit, the Secretary of the Interior, acting for and in behalf of the United States of America, entered into a certain written agreement with Imperial Irrigation District, a municipal corporation of the State of California, whereby the said municipal corporation promised and agreed to pay to the United States of America, the sum of One Million Six Hundred Thousand Dollars, for certain rights and privileges in the use of and taking of water from the Laguna Dam of the Yuma project of the United States Reclamation Service, whereupon the Secretary of the Interior, acting for and on behalf

of the United States of America, promised and agreed to and with the plaintiff corporation, acting through and by its duly authorized representative, one Mulford Winsor, that said sum of One Million Six Hundred Thousand Dollars, so agreed to be paid by said Imperial Irrigation District to the United States of America, should be and would be credited to the land owners within Tract C of the Yuma Project, otherwise the Lower Yuma Valley, as described in the complaint, upon the amounts declared to be due upon their lands for the cost and expense of said Yuma Project in the same proportion as the cost of the Laguna Dam of said project had been pro rated upon the lands of the said land owners; for which reason it would be unjust and inequitable to permit the defendants in this suit to deprive the plaintiffs of the use of irrigating water in the manner described in the complaint, or at all.

Wherefore, plaintiffs pray that they have the relief prayed for in the complaint filed herein.

THOS. D. MOLLOY,
Solicitor for Plaintiffs.

(Duly verified.)

for the reason and upon the ground that such refusal was in abuse of the discretion of said Court, said pleading being necessary and proper, as it set up matters and things that had occurred since the filing of the original complaint herein, and prepared to meet and set forth a defense created by the defendants and their superior officers subsequent to the filing of the complaint herein, and that the second paragraph thereof set forth an equitable defense against the charge of seventy-five dollars per acre, even if such an amount had been the estimated cost as originally determined by the Secretary of the Interior; to which ruling of the Court in refusing permission to file said pleading plaintiffs thereupon duly excepted. (Trans. Rec. p. 543.)

14.

That said District Court erred in finding and deciding (Trans. Rec. p. 555) that the Yuma Project has cost greatly in excess of the estimate by the engineers, it being irrelevant and immaterial whether or not the actual cost is greatly, or at all, in excess of the estimates made by the engineers, for the reason that Section 4 of the said Reclamation Act requires and determines the amount to be repaid into the Reclamation Fund as the estimated cost originally made by the Secretary of the Interior; in any event, there was not sufficient, or any, evidence before the court establishing the fact that the actual cost greatly or at all, exceeded the estimated cost, said District Court having ruled and decided during the progress of the trial that it did not care to hear any evidence as to the actual cost of the project, and Section 4 of said Reclamation Act of June 17, 1902, requiring that the estimated cost and not the actual cost be repaid.

15.

That said District Court erred in finding and deciding (Trans. Rec. p. 561) that the testimony in this case shows that the annual net revenue per acre of the lands within the Yuma Project is almost equal to the cost per acre of the project; there being no evidence whatsoever in this case as to the rental value of any lands whatsoever within the Yuma Project, except as to one tract of land belonging to the witness Oscar P. Bondesson; such finding being against the evidence and unsupported by the evidence.

16.

That said District Court erred in not passing and deciding upon plaintiffs' contention set forth in their amended pleading filed at the commencement of the trial in this case on April 28, 1919, wherein the plaintiff association sued and contended for and on behalf of

certain of its constituent members who made homestead entries subsequent to the commencement of the Yuma Project and after the lands therein had been withdrawn from all form of entry, except homestead entries, under the provisions of said Reclamation Act, and who are the owners and holders of larger areas of land embraced in said entries than would be permitted to be held by them according to the terms of the so-called public notice of April 6, 1907, defendants' Exhibit 8, which attempts to reduce the holdings of said entrymen to a farm unit of the area of forty acres, or less, notwithstanding that by operation of law and the acceptance of the filing fees and commission for larger areas than forty ~~years~~ acres, and the Secretary of the Interior permitting said entrymen to hold their said lands for long periods of years, the area per entry of each and all of said entries had been fixed and determined at a greater area than forty acres; and the evidence in this case in any event shows that the Secretary of the Interior had, in the year 1910, fixed the area of farm units in said Yuma Project at eighty acres per entry; and erred in finding and deciding, in effect, against said contentions by entering its decree dismissing plaintffs' bill.

17.

That said District Court erred in finding and deciding (Trans. Rec. 556) that this case is governed by the decision in the case in the U. S. District Court in and for the District of Idaho, namely, Payette-Boise Water Users' Association vs. D. W. Cole, et al., for the reason that the evidence in the stated case shows conclusively that the settlers and land owners within the Payette-Boise Project waived their rights under Section 4 of said Reclamation Act of June 17, 1902, while in this case it has not been proved, nor attempted to be proved, that the plaintiffs in this case, or any of them, waived their rights under Section 4 of said Reclamation Act to have granted to them a water right at the estimated cost of less than forty dollars per acre.

18.

That said District Court erred in finding and deciding (Trans. Rec. 559) that the case of Swigart vs. Baker, 229 U. S. 187, is controlling in this case, for the reason that the questions here involved were not before the Supreme Court of the United States for decision or adjudication in that case, and anything therein decided was dictum as far as this case is concerned; and that the U. S. Supreme Court, in the Swigart-Baker case, did not pass upon or construe Sections, 2, 3 and 4 of the Reclamation Act of June 17, 1902, which are involved in this case.

19.

That said District Court erred in finding and deciding (Trans. Rec. p. 553), that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands benefitted, and that such cost, when collected should be paid into the Reclamation Fund to replenish its fund, and thereby make irrigation at least a self-sustaining enterprise; such finding and decision being contrary to the provisions of Section 2, 3 and 4 of said Reclamation Act of June 17, 1902. (32 Stat. 388.)

20.

That said District Court erred in finding and deciding (Trans. Rec. p. 553) that it cannot be supposed that the estimated cost based "on opinion and roughly made from imperfect data," such only as was available in laying out work on a large scale is all that the land owners can be required to pay regardless of the actual cost of the project; that to place such a construction on the Reclamation Act would in effect nullify it and defeat its every purpose; that it was the purpose of Congress to require the charges to be equitably apportioned with a view of returning to the Reclamation Fund the entire cost of construction thereof, and that the term

"estimated cost" must be interpreted and construed in the light of the objects and purposes sought to be accomplished, and of the situation surrounding the proposed project during and at the time the preliminary examinations and surveys were being made; said finding, decision and construction of law being contrary to the letter and spirit of the Reclamation Act of June 17, 1902, and particularly Sections 2, 3 and 4 thereof.

21.

That the said District Court erred in finding and deciding (Trans. Rec. p. 554) that the estimated cost of the Yuma Project is the cost as finally announced by the Secretary of the Interior on April 6, 1917, for the reason that the evidence conclusively shows that the Secretary of the Interior did, on or about May 10, 1904, and some thirteen years prior to April 6, 1917, fix and determine the estimated cost of the Yuma Project at less than forty dollars per acre; such finding being unsupported by the evidence and against the evidence, and contrary to the letter and spirit of the Reclamation Act of June 17, 1902.

22.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the Secretary of the Interior did not make an estimate of the cost of the Yuma Project on May 10, 1904, and in finding and deciding that the circulation among the landowners and settlers within the Yuma Project in May, 1904, of a certain pamphlet containing letters, reports and estimates, did not constitute a public notice within the meaning of the Reclamation Act; and in finding and deciding that the public notice was the one given April 6, 1917; the evidence in this case conclusively showing that the Secretary of the Interior did estimate and determine the cost of the Yuma Project on May 10, 1904, and did thereafter, on May 28, 1904, and continuously until May 31, 1906, in compliance with Section 4 of the Reclama-

tion Act of June 17, 1902, give public notice of the lands irrigable under said project, and of the charges which should be made per acre upon the entries and private lands therein, together with the number of annual installments in which said charges should be paid, and the time when such payments should commence.

23.

That said District Court erred in finding and deciding (Trans. Rec. p. 560) that the contract of May 31, 1906, Exhibit "C" annexed to plaintiffs' complaint, and defendants' Exhibit 7, means, or should be construed as meaning and expressing, that the plaintiffs are bound thereby to pay that part of the cost of the Yuma Project attempted to be apportioned thereto by the Secretary of the Interior by the so-called public notice of April 6, 1917; for the reason that said contract should be construed to have written into it the express terms of Section 4 of the Reclamation Act of June 17, 1906, whereby it is prescribed that the estimated cost of the project shall be returned to the Reclamation Fund; and the evidence in this case conclusively shows that the cost of the Yuma Project was estimated and determined on May 10, 1904, by the Secretary of the Interior; and erred in finding and deciding that said contract provides by its terms that the payments to be return to the Reclamation Fund for the construction of the Yuma Project are now due and payable; said contract providing by the express terms that the payments shall not begin until the Yuma Project is completed; and the evidence in this case conclusively showing that said Yuma Project is not yet completed.

24.

That said District Court erred in finding and deciding (Trans. Rec. p. 564) that the Yuma Project from a practical standpoint, or at all, was completed on April 6, 1917; the evidence in this case conclusively showing that said project was not completed on April 6, 1917,

and that it is not now completed, and there being no evidence whatsoever proving or tending to prove that said project is completed or that it was completed April 6, 1917.

25.

That the United States District Court for the District of Arizona erred in adjudging and decreeing (Trans. Rec. p. 565) that plaintiffs' bill of complaint herein be dismissed, thereby denying the plaintiffs the equitable relief prayed for in their complaint herein, such decree and judgment not being supported by the evidence, and being against the weight of the evidence, and being contrary to law and equity, in the following particulars, to-wit:

(a) That said judgment and decree is unsupported by the evidence, and is contrary to the weight of the evidence in this, that the contract which is annexed to plaintiffs' complaint as Exhibit "C" thereto, and in evidence herein as defendants' Exhibit 7, provides, according to its express terms, that the payments for the water rights to be issued to the shareholders of the plaintiff association, under the provisions of the Reclamation Act of Congress, June 17, 1902 (32 Stat. 388), should not be begun to be made until the completion of the proposed reclamation works of the Yuma Project of the United States Reclamation Service, the subject of said contract; and the evidence in this case conclusively proves and shows that said proposed works were not completed at the time of the institution of this suit, and are not now completed; and the defendants were attempting to, at the time of the institution of his suit, and will, unless enjoined by this court, unlawfully and wrongfully compel the plaintiffs to commence making such payments prior to the completion of said proposed works, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(b) That said Reclamation Act of June 17, 1902, provides, among other things, that the charges which shall be made per acre upon lands within the United States Reclamation Projects, including the Yuma Project, which is the subject of this suit, shall be determined with the view of returning to the Reclamation Fund the estimated cost of the construction of the project; and the evidence in this case conclusively shows that the estimated cost of said Yuma Project, as fixed and determined by Secretary of the Interior in accordance with said act, is less than the sum of forty dollars per acre, and the defendants in this case were, at the time of the institution of this suit, unlawfully attempting to, and will, unless enjoined by this court, wrongfully compel the plaintiffs to pay the sum of seventy-five dollars per acre as the cost of said project, by unlawful and inequitable means, to the great and irreparable injury and damage of the plaintiffs and all for whom they sue herein.

(c) That the evidence in this case shows and proves that it was at the time of the institution of this suit, and now is, the duty of the defendants continue to supply irrigating water to the lands of the plaintiff Archie J. Griffin, and those for whom he sued herein, situated in Tract A as described in the complaint herein; and that the defendants have unlawfully and wrongfully shut off, and refused to deliver, irrigating water onto the said lands, and will continue to shut off and refuse to deliver such water to said lands to the great and irreparable injury and damage of the plaintiff Griffin and those for whom he sues herein, and the plaintiff Yuma County Water Users' Association.

(d) That the evidence in this case shows and proves that the entrymen who are constituent members of the

plaintiff Yuma County Water Users' Association, and for whom said Association is suing herein, as paritcularly described and set forth in plaintiffs' amended pleading filed with leave of court on April 28, 1919, at the commencement of the trial herein, are lawfullly entitled to hold the full areas of their, and each of their, respective entries, and the defendants were at the time of the institution of this suit unlawfully and wrongfully attempting to compel said entrymen to reduce each of their respective entries to forty acres in area, and the defendants will, unless enjoined by this court, continue to wrongfully and unlawfully attempt to compel said entrymen to so reduce their said entries, by wrongfully and unlawfully shutting off and refusing to supply to said entrymen irrigating water for the lands embraced in their respective entries, to the great and irreparable injury of the said entrymen.

(e) That the evidence shows that the defendants were proceeding, and will proceed, unless restrained by this court, to unlawfully and wrongfully shut off irrigating water from the lands of all the plaintiffs and those for whom they sue herein to their great and irreparable injury and damage, and that in law, justice and equity the plaintiffs are entitled to the relief prayed for in their complaint; and said court erred in not granting the relief prayed for, and in not perpetually restraining and enjoining the defendants from shutting off and refusing to supply irrigating water to said lands, and in not otherwise doing equity as prayed for.

(f) That the evidence and pleadings herein conclusively show that the defendants were, at the time of the institution of this suit, unlawfully attempting, and will, unless restrained and enjoined by this court, continue to unlawfully attempt to compel the plaintiffs, and those for whom they sue herein, to execute and deliver

to them an unlawful, unconscionable and inequitable contract, which would have the effect, among other bad effects, of depriving them, and each of them, of their, and each of their, property for a public purpose without compensation and due process of law, in violation of the Constitution and laws of the United States and the State of Arizona, a copy of which contract is annexed to plaintiffs' complaint as Exhibit "D" thereto, and in evidence as defendants' Exhibit 16, by threatening to shut off the supply of irrigating water from their lands, to their great and irreparable injury and damage.

26.

That said District Court erred in not granting the releif prayed for in plaintiffs' complaint, for all the reasons and upon all the grounds set forth in the preceding assignment of error, No. 25, which, for the sake of brevity, are not set forth here, but to which reference is hereby prayed.

SECOND

Appellants charge and allege that the U. S. Circuit Court of Appeals, in its Decision and Decree of Nov. 7, 1921, erred as follows, to-wit:

1.

In finding and deciding that the Public Notice of April 6, 1917 was given in clear accord with the statute; said Notice not having been given, as required by law, immediately upon the determination by the Secretary of the Interior that the Yuma Irrigation project was practicable, and immediately after he had let contracts for the construction of portions of the same, in August, 1905; and said Notice did not contain and promulgate the estimated cost per acre of the project, as determined by the Secretary in 1904; but contained and promulgated an excessive and arbitrary charge of $75 per acre, more than double the amount of the Estimated Cost.

2.

In finding and deciding that Appellant's point that that the system had not been finished—that "the proposed works had not been completed"—prior to the commencement of the suit, is of no real importance; for the reason that the pleadings, the uncontradicted evidence, and the official Reports of the Secretary of the Interior to Congress, in accordance with the provisions of the Reclamation Act, shows conclusively that "the proposed works", as described in the contract of commencement of this suit and were not completed at the time of the trial, and are not now completed.

3.

In not reversing the Decree of the U. S. District Court for the District of Arizona; and in not granting us the relief prayed for in Appellant's Bill of Complaint; in affirming the Judgment and Decree of the said District Court; for all the reasons set forth in the preceding Grounds of the First and Second Specifications of Error.

Wherefore, it is prayed the Judgments and Decrees of said Lower Court be reversed; and that they be directed to grant Appellants the relief prayed for in their Complaint; or that this Court enter such judgment herein as it shall deem meet and just.

THO'S. D. MOLLOY,
Counsel for Appellants.

ARGUMENT

INTRODUCTION

a. In this case, as pointed out in the 14th Paragraph of the Statement of the Case, supra, the principal questions involved are: What are the proper charges to be assessed against the lands involved, and whether or not the time had arrived on Dec. 1, 1917, or has yet arrived for the payment of the first installment of those charges.

b. In the Circuit Court of Appeals we assigned 26 Errors, which we conceived were committed by the Trial Court in the trial of the Case, expressed in the Opinion of the Trial Judge, and put into effect by the Decree. The Circuit Court of Appeals, if it erred, committed but one error, strictly speaking, which was in affirming the Decree and Judgment of the Trial Court. We have, however, here specified two errors; by the First it is charged that the Circuit Court erred in affirming the Judgment of the Trial Court, and we have alleged the 26 errors originally charged against the Trial Court as 26 separate grounds for the First Specification of Error charged against the Circuit Court. The Second Specification of Error calls attention, on less numerous grounds, to particular errors, in addition to those of the Trial Court, into which we believe the Circuit Court fell in expressing its opinion.

c. The principal Error charged, to the effect that the Trial Court erred in dismissing our Bill and refusing us relief, and that the Circuit Court erred in sustaining that dismissal, is set forth in the 25th and 26th Grounds of the First Specification of Error; and the principal Argument will be urged in support of those Grounds, but it will be principally by reference to the the arguments in support of the 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th Grounds of the First Specification of Error; and as set forth in Divisions XVII, XVIII, XIX, XX, XXI, XXII, XXIII, and XXIV of the

following Argument. However, all the grounds of Error will be argued, and none are waived.

d. In specifying the errors relied upon, we have adopted the plan of charging them in sequence as they occurred during the progress of the trial; and those errors are attacked by the first 13 Grounds of the First Specification of Error, and are supported by Divisions I to XIII of the Argument; the 14th to 24th, Grounds of the First Specification of Error, inclusive, attack the findings and expressed views of the Trial Court, as set forth in the Opinion of the Trial Judge; and we attempt to support those Grounds in Divisions XIV to XXIV of the following Argument. As before stated the 25th and 26th Grounds of the First Specification deal with the dismissal of our Bill and the refusal of the relief prayed for, and are support by Divisions XXV and XXVI of the Argument.

e. In the following Argument we attempt, and particularly desire, to stress and emphasize the following misapprehensions and errors of the Lower Courts:

1. In misconstruing the intention of Congress in the enactment of the Reclamation Act; and the Act itself; and in finding and deciding that any sum whatever in excess of the Estimated Cost can be charged against our lands, or returnel into the Reclamation Fund.

2. In finding and deciding that the Estimated Cost of the Yuma Project was not fixed and determined by the Secretary of the Interior in May, 1904, at less than $40 per acre; and in holding that the charge of $75 per

acre was lawfully charged against our lands by means of a Public Notice issued in April, 1917.

3. In misconstruing the force and effect of the Public Notices to be issued under Sec. 4 of the Reclamation Act; and that such a notice could have the effect, whenever issued, of determining the Estimated Cost of a PROJECT.

4. In misapplying the Decision in the Payette-Boise case, 263 Fed., 734; and in not following Judge Deitrich's opinion as to the meaning of Sec. 4 of the Reclamation Act, that the original Estimated Cost is to be returned, and not the actual cost.

5. In holding that this Court, in the Swigart-Baker case, 229 U. S., 187, decided that the Actual Cost, and not the Estimated Cost, of a Reclamation Project should be returned to the Fund.

6. In finding and deciding that the terms of the contract of May 31, 1906, had been complied with, and that "the proposed works" were completed; and that, therefore, the payments for the project, whatever they be, should have begun on Dec. 1, 1917.

(b) In the following Argument numerous references will be made to, and quotations taken from, the Annual Reports of the Secretary of the Interior to Congress as to the workings of the Reclamation Act, in accordance with Section 2 thereof. These reports and the pages thereof will be referred to in the following argument as follows: 4th Ann. Rep. R. S.. 75, as the case may be. They are officially designated as First, etc.,

Reports of the Reclamation Service, although made by the Secretary of the Interior.

(c) Those reports and other public documents are of great importance in this case, for the reason that by stipulation of the parties and Order of the Court (Rec. 203-8) they are deemed to be in evidence; and the parties may set forth in their respective briefs any portion of those public documents, with like force and effect as if they were incorporated in the Record. Quotations from them greatly lengthens this Argument, but the Transcript of the Record is shortened to that extent.

(d) It was urged below, and may be urged here, that the Trial Court was without jurisdiction, for the reason, as alleged in the Answer, that this is really a proceeding against the United States itself, which cannot be sued without its consent; but that contention was overruled, and properly so, under he authority of

Magruder vs. Belle Fourche, 219 Fed. 72,
Pars. 1, 2, 3 and 4 thereof,

and the authorities there cited.

I.

IMPROPER CROSS-EXAMINATION AS TO VALUES

In support of our 1st Ground of the First Specification of Error, we point out that, notwithstanding plaintiffs alleged in their Complaint in Sec. a Par. 23A thereof (Trans. of Rec. p. 24), that the lands involved could not

afford to pay the charge of $75 an acre, as assessed by the Public Notice of April 6, 1917, taken one year with another; and that said charge was excessive and exorbitant and out of all proportion to the actual value of the works constructed, plaintiffs did not, originaly, in the trial of the case proceed upon that theory, but rather upon the theory that the Secretary of the Interior having in May, 1904, determined the charges per acre to be borne by the lands in the Yuma Project to be less than $40, that charge was conclusive upon all concerned, whether or not it was an inequitable burden, or whether or not the works were worth it; and in our presentation of the case we refrained from offering any evidence in support of that allegation of the Complaint, until in the cross-examination of our principal witness Oscar P. Bondesson the defendants were permitted, over our objection (Trans. of Rec. pp. 290 to 296), to bring out matter tending to show the value of the lands within the project generally, and particularly the rental value of Mr. Bondesson's own land in the years 1916-17-18. This. we respectfully contend, was not proper cross-examination. We had not asked the witness anything about any time subsequent to the execution of the contract of May 31, 1906. That proposition, we believe, needs no citation of authority. It is true that the Trial Judge stated (Trans. of Rec. p. 294) that he heard the evidence for the purpose, among others, of determining what orders might thereafter be made in connection with an injunction pending a possible appeal; but it appears from the Judge's Opinion (Trans. of Rec. pp. 555 and 561) that it was heard for all purposes, and that very important findings of fact were based upon it; therefore the matter brought out in improper cross-examination was

prejudicial. Surely the value of lands within Yuma Project in the year 1917, and whether or not Mr. Bondesson was so fortunate as to be able to rent his particular pieces of land, adjoining the growing town of Somerton, as will be shown by the plats at pp. 40 and 228, Trans. of Rec., for $30, or any other sum, per acre, could not throw any light upon whether the Secretary of the Interior on May 10, 1904, properly advised from having before him the necessary maps, plans and estimates of cost, made the determination that the charges per acre on lands within Yuma Project should be less than $40 per acre; and did not in any way tend to answer the question as to whether or not "The Proposed Irrigation Works" were completed, as required by the contract of May 31, 1906; and whether or not said contract was ambiguous or unambiguous. Our theory of the case was certainly the theory later entertained by the Trial Judge as shown by his declaration from the bench at pp. 424, 468, 477 and 538 of Rec. It seems that, if the Trial Judge had entertained those views at the time of the objection to the cross-examination of the witness Bondesson, he should have sustained the objection.

II.

MORE IMPROPER CROSS-EXAMINATION

We urge in support of our 2nd Ground of the First Specification of Error that the error therein specified is of the same nature as that set forth in the 1st Ground. Improper cross-examination of the witness Bondesson (Trans. of Rec. 301-2), and the bringing out thereby, of the same kind of testimony. All that was said in the

preceding paragraph in support of the 1st Ground is hereby referred to and urged in support of this Specification of Error.

III.

IMPROPER CROSS-EXAMINATION SHOULD BE STRICKEN

The 3rd Ground of our First Specification of Error is based on the refusal of the Trial Court to strike out the testimony incorporated in the 1st and 2nd Grounds of the First Specification of Error. Necessarily, if our contention urged in support of the 1st Ground (and they are here reurged) are sound, the 3rd Ground is well taken and should be sustained.

IV.

PROFFER AS TO INDUCEMENTS SHOULD HAVE BEEN HEARD

Our 4th Ground of the First Specification of Error is based upon the following state of facts: During the progress of the trial plaintiffs offered and had heard oral evidence from the witnesses Bondesson, Ingraham et al., as to the circulation of the pamphlet, plaintiffs' Exhibit 15 (Trans. Rec. pp. 215 to 228): and as to certain statements made at the mass meeting of May 28, 1904, at Yuma, Arizona, by the Chief Engineer and the Supervising Engineer of the United States Geological Survey, and that all of the landowners within the Yuma Project believed in and relied upon such statements and representations, else they would not have mortgaged their homes to secure the payment of even the $35 per

acre that they were led to believe the project could be, and would be, built for (which in the final consideration of the case was admitted and carefully considered. R. 561); but during the progress of the trial, the Trial Judge announced that he would not consider the oral testimony as to what was said by the engineers (Rec. 476), or what was done on May 28, 1904 (Rec. 477), and there was an arrangement with court and counsel (Rec. p. 369), that, for the purpose of saving expense and the time of the Court that the offer set forth in our 4th Ground of the First Specification of Error might be made, refused, and exception deemed taken to the ruling. Evidently the Trial Court did not, as we view it, give due weight to the force and effect of all that our witnesses testified to, or what our prospective witnesses would have testified to, else the Court would not have found (Rec. p. 561) that the landowners ONLY BELIEVED that the estimate of the probable cost of the project was ample. Our proof, and proffered proof, was to the effect that the landowners were induced, by the pmaphlet and the representations ,to enter into a definite, fixed contract at a specified sum, the payment of which they mortgaged their homes to secure. We contend that the proffered proof (Trans. of Rec. 369) should have been heard, and that it was error to refuse to hear it. The only theory on which it could have been properly rejected, was that it was merely cumulative. The testimonies of our witnesses Bondesson, Cloyd, Donovan, Greer, Ingraham and Lyon, being sufficient on those points—but the proffer was not refused on that ground (Rec. 504-5).

(Division V)

PROFFER AS TO EXCESSIVE CHARGE AND VALUE WORKS SHOULD HAVE BEEN HEARD.

In support of our 5th Ground of the First Specification of Error, we point out that, while, as before stated, the plaintiffs had refrained from offering any evidence in support of their allegations (Trans. of Rec. p. 24) that the charges of $75 per acre were excessive and inequitable, and that the lands could not stand them, one year with another, when the Trial Court permitted the defendants, over our objections, to draw from the witness Bondesson, in cross-examination, some facts tending to show that the charges were not excessive, and that the lands could equitably bear the charges, then we insist that it became imperatively necessary, in the interests of justice and a fair trial, that the plaintiffs be permitted to introduce the proffered evidence set forth in the 5th Ground of the First Specification of Error (Trans. of Rec. p. 371). Upon our theory of the case, as originally acted upon, and later entertained by the Trial Judge (R. 424, 468, 477, 538); and if the Bondesson testimony brought out on improper cross-examination, as shown in the 1st and 2nd Divisions hereof, had been ignored that error would have been harmless, as would have been the rejection of this proffered evidence: but when we find the Trial Judge finding as facts—"when we take into consideration the results accomplished and the increase in the value of the lands under the project * * * it would seem that such expenditures were amply justified (Trans. Rec. p. 555); and "it may be said that while the cost of the construction was much greater than was anticipated, the lands have been

greatly benefitted, and the testimony shows that the annual net revenue per acre is almost equivalent to the cost per acre of the project" (R. 561) it can be seen how highly prejudicial the rejection of that proffered testimony was.

VI.

PROOF AS TO HOMESTEADERS.

After the plaintiffs were permitted to amend their complaint (Trans. of Rec. p. 142), as shown at pp. 57 to 61 Trans. of Rec., the corporate plaintiffs being thereby permitted to sue on behalf of that class of its constituent members who were homesteaders, and whose entries are threatened with reduction in area to the limit of one farm unit, it seems as if the proffered testimony as set forth in the 6th Ground of the First Specification of Error (Rec. 372) should have been received. We believe that the appellees, through their counsel, are willing to admit all the allegations as shown in the second paragraph of the amendment, pp. 58 to 60, Trans. of Rec., but unless such admissions are somewhere made of record, it clearly appears to us that it was error to reject the proffered proof. It may be that in law those facts, even if admitted, would not entitle that particular class of landowners to the relief prayed for as to them; but there was no objection on that ground, and only the general objection, without any assigned reason, that the proffered evidence, was incompetent, irrelevant and immaterial (Rec. 373) which it certainly was not after the Complaint had been amended, as pointed out.

(Division VII.)

PROOF AS TO COST SHOULD HAVE BEEN REJECTED.

In support of our 7th Ground of the First Specification of Error, we urge that the testimony of Director Davis therein incorporated (Rec. foot of 379 to 384) should not have been admitted over our objections. In the first place the answers were not responsive to the questions, as what was inquired about (Rec. 380) was the difference of opinion between the witness and the other five members of the Board of Consulting Engineers which met at Yuma, Arizona, and formulated and made the report under that date, plaintiffs' Exhibit 16 (Rec. 235, see also Rec. 409); and, in any event, the testimony was not relevant or material on plaintiffs' theory of the case adopted by them, and as the case was actually tried under the ruling of the Trial Court as shown; and certainly not relevant or material on the theory of the case adopted by the Trial Court (Rec. 424, 68 and 77 and 580); for, certainly, whether or not Mr. Davis disagreed with his associates, or whether or not certain items of cost increased, could not aid the Court in determining whether or not the Secretary of the Interior had, on May 10, 1904, fixed the estimated cost of the project according to law; or in determining whether or not the project was finished as provided for by the contract of May 16, 1906. This testimony also tended to show the actual cost of the project which the Court later refused to hear about; and we deem it inequitable and wrong for the defendants, thirteen years after the Secretary of the Interior had formally and officially declared the cost of the project, and his official represent-

atives had given assurances that the project could be, and would be, constructed for $35.00 per acre, and the landowners believing in, and relying upon, those assurances (see testimonies of Bondesson, pages 261 to 269, and page 275; Ingraham, pages 324 to 333; Cloyd, 344; Donovan, 348; Greer, 352; and Lyon, 336, Trans. Rec.) had mortgaged their homes to secure that originally estimated cost, to be permitted to introduce that portion of Mr. Davis' testimony for the purpose of establishing a charge of more than double the amount that the landowners believed they were contracting for.

VIII.

DIRECTOR DAVIS' IMPEACHMENT OF THE DETERMINATION OF THE SECRETARY

In support of our 8th Ground of the First Specification of Error, as to the admission of Mr. Davis, testimony therein incorporated (Rec. 385 to 392), we deem the reasons and grounds set forth in the Specification itself, as support thereof, and we urge the same that such testimony is irrelevant and immaterial as the examination and surveys of the Yuma Project had been duly made under the provisions of the Reclamation Act of June 17, 1902, as conclusively shown by the evidence in this case, in the years 1902, 1903 and 1904, and prior to May 10, 1904, by the Secretary of the Interior for the purpose of locating and constructing said Yuma Propect, and that upon such examinations and surveys the Secretary of the Interior had, on May 10, 1904, determined the feasibility and practicability of said

(Division VIII.)

Yuma Project and all thereof including the North and South Gila Valleys described in plaintiffs' complaint as Tracts A and B, respectively; and did thereafter July let contracts for the construction thereof; and any opinion of the witness Davis in 1919 as to whether or not said project was then, or on April 6, 1917, feasible and practical is irrelevant and immaterial and an attempt to impeach and impair an official and judicial determination of his superior officer, the Secretary of the Interior, made in 1904, when such officer had jurisdiction to so determine and estimate. And upon the further ground that it is irrelevant and immaterial what was the significance of the acquisition (if there was an acquisition) of the Lower Colorado Irrigation District, for the reason that all such questions and negotiations were merged in the written contract of May 31, 1906, annexed to plaintiffs' complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7; and said testimony of said witnesses was an attempt to vary the terms of said written instrument by parole. And for further reasons that all the surveys and plans referred to in said testimony had been reduced to writing, and the plans and surveys themselves were the best evidence; to which ruling of the Court in overruling plaintiffs' objections to the introduction of said testimony and in admitting its introduction, the plaintiffs duly excepted at the time, and if any significance should be attached to Mr. Davis' answer to the question of the Court at page 388 Record, to the effect that he, Director Davis, had determined the Gila portions of the project not to be feasible, we respectfully suggest that Mr.

Davis was not the proper officer to make such determinations, but his superior officer, the Secretary of the Interior.

IX.

HEARSAY TESTIMONY OF MR. DAVIS.

Our 9th ground of the First Specification of Error may very well be waived, but the testimony therein (Rec. 401-2) does not seem to have been closely enough connected with any party to this suit to render it proof against the urged objection of it being hearsay. We believe and urge that it should have been rejected.

X.

DIRECTOR DAVIS' DIP INTO THE FUTURE.

We also urge that the testimony incorporated in our 10th ground of the First Specification of Error (pages 404 to 407, Rec.) should also have been rejected for the reason and upon the grounds set up in the specification itself, which are herein renewed: It was irrevelant and immaterial and too speculative, it not tending to prove or disprove whether or not the proposed works of the Yuma Project as set forth and described in the contract of May 31, 1906, annexed to plaintiff's complaint as Exhibit "C" thereto, and introduced in evidence as defendants' Exhibit 7, were completed or uncompleted at the time of the institution of this suit, or at the time of the trial; what will happen in the future or subsequent to the trial herein could not tend to throw any light upon what had happened on April 6, 1917, the date of the so-called public notice involved in this suit.

(Divisions XI, XII and XIII.)

XI.

MR. LIPPINCOTT'S TESTIMONY

We think it quite clear that the testimony of the witness Lippincott, incorporated in our 11th ground of the First Specification of Error (Rec. 489-90) was susceptible to the objections urged; as it was not responsive, and did not come within the scope of the cross-examination, and did not tend to prove or disprove whether or not the project was completed. Clearly because Mr. Lippencott in one drive thru the valley saw some evidences of some prosperity did not tend to prove that the project was completed as requred by the contract; any more than proof that one farmer was lucky enough to have rented one piece of land adjacent to a town for $30.00 per acre, for three years, proved that all the land in the project was able to bear a charge of $75.00 per acre.

XII.

SHOULD HAVE BEEN STRICKEN.

If it was error to admit testimony of Mr. Lippincott, as set forth in Specifications, of Error eleven, of course our twelfth ground of the First Specification of Error should be sustained, as it was error not to strike the testimony on our motion. (Rec. 490.)

XIII.

THE PLEA OF EPUITABLE SET-OFF.

In support of our 13th ground of the First Specification of Error we urge the following:

a. The defendants, over the objections of the plain-

tiffs (Rec. 393), had been permitted to introduce in evidence their Exhibits Nos. 3 and 4 (Rec. 396 to 400), on the theory, we presume, that these official documents tended to prove that the Secretary of the Interior had officially determined the Gila portions of the project to be no longer feasible; and Director Davis had been permitted to testify, over our objections, as heretofore set forth, that those portions of the project were no longer feasible, and that HE had DETERMINED that it was impracticable to irrigate them (Rec. 596); those documents being both dated long subsequent to the institution of this suit, and evidently being the result of second thought, and, if we were opposed to a private litigant we would have no hesitation in asserting that they were executed in bad faith for the purpose of affecting the result of the law suit. As to WHEN Director Davis, judicially or otherwise, determined that the Gila portions of the project were no longer feasible, is not clear from his testimony; but such determination upon the part of Mr. Davis must have been recently arrived at, for, as we will later show in support of our 24th ground of the First Specification of Error, Mr. Davis had recently, through the Secretary of the Interior, reported otherwise to Congress. Under all the circumstances we should have been permitted, on our petition, (Rec. 136), to plead and prove the facts alleged in the first paragraph of the proffered supplemental pleading (Rec. 138). The circumstances we are so unusual it is difficult, if not impossible, to find apt authority in point, and we are unable to cite any; but submit the

question to the sound judicial discretion and equitable conscience of this Court.

b. As shown from the cross-examination of Director Davis (Rec. 446), without objection, Imperial Irrigation District, the municipal corporation which manages and distributes the water supply to the great Imperial Valley in California, in the year 1918, long subsequent to the institution of this suit, entered into a contract to pay the United States $1,600,000.00 for the use of the Laguna Dam, the most important and costly portion of the Yuma Project, but that the plaintiffs in this case are not, in Mr. Davis' opinion, to receive any credit or benefit because of that contract or the future payments thereunder, as shown at pages 446-7-8 of the Record. Under Equity Rule 46 the plaintiffs were permitted to introduce the evidence of Mulford Winsor (Rec. 537 to 541) tending to show that the Secretary of the Interior Lane had made some promises that the plaintiffs were to receive some credit and benefits from the Imperial Irrigation contract and the $1,600,000.00 to be paid thereunder. Under these extraordinary circumstances we contend that we should have been permitted to plead and prove the facts alleged in the second paragraph of the proffered supplementary pleading (Rec. 139-40), on our petition to that effect (Rec. 136). If, as finally held by the Trial Court, we are compelled to pay the actual cost of the project at $75.00 per acre, notwithstanding the official declaration of the Secretary of the Interior on May 10, 1904, that the cost, would be less than $40 per acre (Rec. 202), and the promises of the engineers that it would not exceed $35.00 per acre, and

the government is to have paid to it $1,600,000 for the use of a dam that have paid for, and that in justice and equity should belong to us, it would seem that in natural justice and in common sense, we ought to get credit for the $1,600,000, as it is paid; and that NOW is the time to settle that question. If the law is so harsh, surely, we ought to be entitled to the equitable set-off, at least, to plead and attempt to prove it.

c. When we use the term "equitable set off" we fully appreciate that it is neither apt nor appropriate; and is only used for the want of a better term. Yet in a sense this may be said to be a case where the defendants are setting up the right to compel us to pay to them $75 per acre for certain services, we contending that we should pay but $40 at the outside. Therefore we believe that any facts that would tend, equitably, to defeat the claim of the defendants, should be permitted to be pleaded. Supplemental pleadings belong primarily to equity practice:

31 Cyc. 499 D.

We believe that the Trial Court was in error when it ruled (Rec. 542) that the plaintiffs could not file a supplemental pleading, for the reason as stated, that they knew all of the facts set forth in the proffered supplemental pleading for some time prior to the commencement of the trial, and TRIED THE CASE ON AN ENTIRELY DIFFERENT THEORY. As we understand the law of pleading dealing with supplemental pleadings, they are permitted either where the facts have arisen since the commencement of the original suit, or

the facts while arising prior to the commencement of the suit, they had not come to the pleader in time to make an amendment:

21 C. J. 540 Sec. 658,

and the facts which occurred after the filing of the original bill cannot be incorporated therein by amendment, but a supplemental bill is the proper and necessary proceeding:

21 C. J. 542 Sec. 659.

(d) It is true, as has been pointed out by the Court, (Rec. 543) that we did try the case on an entirely different theory. That theory was also adopted by the Trial Court (Rec. 424, 468, 477); but nevertheless the defendants were permitted, over our objections, to introduce in evidence the purported orders of the secretary, defendants' Exhibits 3 and 4 (Rec. 496-8); and the peculiar and unprecedented facts concerning the contract with Imperial Irrigation District had been got into the Record without objection; and we feel that the Lower Court had in many ways departed from its and our theory of the case; and we urge that in justice and equity the supplmental pleadings should have been permitted.

(e) We do not wish to be misunderstood in this matter: We are still willing to adhere to our original theory: that on May 10, 1904, the Secretary of the Interior fixed the charges per acre of the Yuma Project at less than $40 (under all the circumstances we are

willing to concede, for convenience—that means $40 per acre, which we are willing to pay). That was equally binding upon the landowners and the government; and that even, if by some chance, the project had cost considerably less than $40 per acre, or, rather, considerably less than $3,000,000, which we shall later show, was the REAL estimated cost of the project, the landowners would have been obliged to pay that estimated sum; and we having paid, or having begun to pay, the estimated cost, as required by law, and the government should, by any chance, be able to reap any benefits from the rent of the use of the Laguna Dam of the Yuma Project, such use not being inconsistent with a proper and sufficient flow of water to the lands of the Yuma Project, it would be none of our concern; for Sec. 6 of the Reclamation Act provides that upon the payments being made the management and operation of the IRRIGATION WORKS should pass to the landowners, but the TITLE and OPERATION of the reservoirs and the works necessary for their protection, etc., should remain in the government. For the purpose of maintaining that view, it could very well be urged that the Laguna Dam creates a reservoir above it, and that it is a necessary work for the operation of that reservoir; and that therefore the title to, and the operation of, the Laguna Dam should remain in the government until otherwise provided by Congress; and therefore the government would be entitled to collect rent for its use from other water users than the plaintiffs in this case. In that view of the case we are in no way concerned in the contract between the United States and Imperial

Irrigation District, or the payments to be made thereunder. But when, as we view it, natural justice and equity and common sense being flouted; and it is judicially determined that we must pay the ACTUAL and COMPUTED cost of the entire project, or such portion thereof as the Secretary of the Interior shall arbitrarily determine we shall pay and then after that arbitrary determination has been made; and we are required to pay more than double the amount that we originally believed we would have to pay when we mortgaged our lands to secure its payment, we believe that a Court of Equity should inquire into all the facts; and if after the determination was made some time prior to April 6, 1917, the government should from an outside source receive the sum of $1,600,000 which had been assessed against our lands, there should be at least a NEW INQUIRY and a NEW DETERMINATION by the Secretary of the Interior and we should get some credit for the payment of $1,600,000.

(f) It is true that on that contention we may be met with the response that Director Davis, as shown by his testimony, as a SEER of wonderfully prophetic vision, and that he well knew as early as 1916 at least, when the estimate of $75 per acre must have been made, that in the year 1918, after this law suit had been begun the Imperial Irrigation District would enter into just such a contract as they did finally enter into, and that he, in advance, gave the Yuma Project due and full credit for this $1,600,000 in the estimating of the cost of $75 per acre. But the answer to that is, that Mr. Davis is not the person or the officer to make those estimates

and to give those credits; but his superior officer the Secretary of the Interior; and that the law does not permit public officials, in dealing with private individuals' rights and property, to be SEERS or PROPHETS, for they should follow the letter of the law.

(g) The whole matter is so peculiar and unprecedented that we believe it would be hopeless to even attempt to search for authorities in point; and therefore we are compelled to submit this question to the sound discretion and equitable conscience of the Appellate Court.

XIV.

IMMATERIAL WHAT THE PROJECT ACTULLY COST.

In support of our 14th ground of the First Specification of Error as to the finding of the Trial Court (Rec. 555) that the Yuma Project has cost greatly in excess of the estimate of the engineers being irrelevant and immaterial, we respectfully urge that if our position taken in the arguments in support of our 19th, 20th and 21st ground of the First Specifications of Error, infra, is sound, it necessarily follows that this Specification of Error is well taken. The finding was based, of course, on the objected-to evidence of Director Davis, which is the subject matter of our 7th ground of the First Specification of Error and the arguments in support of that ground, as well as the other three mentioned, are hereby referred to and urged in support of this specification.

(Division XV.)

THE FINDING AS TO ACTUAL NET REVENUE

a. In our 15th ground of the First Specification of Error we attack the finding of the Trial Court (Rec. 561), that the annual net revenue per acre of the lands within the Yuma Project is almost equivalent to the construction cost per acre of the project. Taken altogether we believe that that is one the most astounding findings of fact ever made by a Trial Court. It is wholly unsupported by the evidence; and the only thing in the Record to even remotely sustain it is the evidence of Oscar P. Bondesson, brought out on improper cross-examination, as we contend, and which is the subject of our 1st, 2nd and 3rd grounds of the First Specifications of Error; and which are argued in the 1st, 2nd and 3rd Divisions of this Argument, where Mr. Bondesson showed that he had rented his lands, which are located adjacent to the town of Somerton (see plat p. 9 hereof), for the sum of $30 per acre per year for a term of three years.

b. Surely there must have been something in the air at the time of the rendering of the decision in this case by the Trial Court to induce, or to hypnotize, such a careful, painstaking, conscientious and learned jurist as Judge Sawtelle to make such a finding of fact. At the time of the trial of the case, and during the time it was under consideration, and at the time of the rendering of the decision, February 26, 1920, we were in the midst of a stupendous farm-products boom in the Yuma Project. Cotton was bringing as high as 51c per pound. Rental values, for the moment, and on paper, had gone even higher than $30 per acre. Some choice tracts of

land had sold as high as $400 per acre; but that was but for one year, and it did not give back to Oscar P. Bondesson, Robert H. Theilmann, Andrew Y. Greer and numerous other early settlers on lands within the Yuma Project, the twenty best years of their lives that they wasted waiting for just such prices; and even if those values had been maintained up to the present hour, which they have not, the average products of the land, one year with another from 1904 to the present time, would not justify a charge of $75 per acre; and as we offered to prove (Rec. 371), the works are not actually worth the sum of $75 per acre. If this case had been tried in the spring of 1921, instead of the spring of 1919, with cotton selling in Yuma Valley at between 8 cents and 10 cents a pound as it was, and not much selling even at that price, and lands having no sale value, and but little rental value, it might very well be, that there would be a different atmosphere altogether and no finding of fact would be made to the effect that the annual net revenue per acre of the land is almost equal to the cost per acre of the project.

c. We feel that finding is peculiarly harsh and prejudicial in view of our offer (Rec. 371) to prove a diametrically opposite state of facts, and Mr. Bondesson's testimony (Rec. 301) that his land cost him more than he will ever get for it in time and labor; and the statement of plaintiffs' counsel, in support of their motion to strike it with other like testimony of Mr. Bondesson (Rec. 312): "if that sort of testimony is to stand, it compels us to open this sort of a field, that those are the fat years in the history of this project.

Then we will have to go into the lean years. In the nature of things we would have to bring what might be called a counter-claim against the Reclamation Service for the damage that is almost inevitable by not finishing the project." We feel that the Trial Judge, no doubt unconsciously, was influenced in rendering the decision in this case by the testimony of Mr. Bondesson brought out in improper cross-examination; and even at that wholly inadequate to establish the rental or other values of the lands within the project, as a whole.

XVI.

THE HOMESTEADERS

In our 16th Ground of the First Specification of Error we challenge the inaction of the Trial Court in not passing upon or deciding the question raised by the amendment to our complaint permitted to be made on the first morning of the trial (Rec. 142 and 57 to 60); and the denial of the relief prayed for in the complaint as amended, for the class of homesteaders described in the amendment.

a. We have already, in support of our 6th Ground of the First Specification of Error presented some of the facts concerning this class of homesteaders. But to be more specific we will take the tract of land entered by Charles Theobald in 1901, prior to the passage of the Reclamation Act, and his successor in interest Wm. A. Hevener, as set forth in the amendment (Rec. 58), in 1904 when the Yuma project was authorized. The Theobald land, while not patented, was in what is known as private ownership. Thereafter in 1908 Theo-

bald relinquished for the use and benefit of Hevener, who immediately entered the land, paid the land office fees and commissions and has ever since down to the present time held full 160 acres of land. This case is typical of 6,000 acres of land in Tract "C."

b. As we shall later attempt to show in support of our 22nd Ground of the First Specification of Error, dealing with the Public Notice, not later than June, 1905, when contracts were let for the Laguna Dam and twelve miles of work on the levees:

4 Ann. Rep. R. S. 98 and 100.

It became the duty of the Secretary of the Interior to give public notice of the limit of area per entry of lands within the Yuma Project:

Sec. 4 Reclamation Act.

But so far as is disclosed in this case the Secretary does not seem to have given any public notice of the limit of area per entry within the Yuma Project until April 6, 1917. At the trial of this case on May 1, 1919, Hevener was still holding his 160 acres of land. He is still holding it owing to certain war legislation and rulings of the Secretary of the Interior.

c. We contend that in the face of those facts, the Secretary permitting Mr. Hevener and numerous other homesteaders similarly situated, to hold their full acreage for some ten years, without any attempt, so far as is disclosed by the testimony in this case, to give a Public Notice or to in any way limit the area of the

entries; the Secretary must be deemed, in equity, to have established the limit of area per entry in the Yuma Project at the full acreage held by the various entrymen; and that he should be estopped in 1917 to say that he did not in 1905 perform his duty as to the giving of the Public Notice limiting the area of entries.

d. We appreciate the fact that a great deal can be said in support of the contention that the Secretary has even now a right to limit the area of those entries. It is true that the Act is explicit that entries made thereunder are subject to all the limitations thereof; and there is a long line of adjudications by the Secretary on the point, which have never been attacked in the courts or otherwise disturbed. But those adjudications were in cases where there was a reasonably prompt attempt made by the Secretary to limit the area of the entries; and not a single case has been brought to the attention of the Land Department, or the courts, where the Secretary had permitted the entrymen to hold all the land embraced in his entry for the period of nine or ten years without any attempt having been made to reduce the entry to a farm unit.

e. Another point is that nowhere does there seem to be any provision to repay to the entryman the fees and commissions paid by him for the entry of the land. Altogether, we believe that the most logical and equitable conclusion to come to in this case is, that it should be assumed as an established fact that the Secretary did, by his continued silence and inaction from June, 1905, until April 6, 1917, actually establish the limit per acre of entries in the Yuma Project at 160 acres, or whatever

less acreage a particular entryman may have succeeded in securing a homestead entry upon.

f. But we have even a more serious attack to make upon the limit of 40 acres sought to be imposed upon the homesteaders in this case; and in this connection we invoke the doctrine of functus officio. Sometime prior to December 5, 1910, more than six years prior to the issuance of the Public Notice in this case, the Secretary of the Interior fixed and established the farm unit areas within the Yuma Project at 80 acres, which is the same thing as limiting the area of the entry. See

9th Ann. Rep. R. S. 73,

"Limit of area of farm units: Public, 80 acres, private, 160 acres."

We now contend, as we shall later and more exhaustively contend in support of our 21st Ground of the First Specification of Error, in the 4th subdivision of the argument in support thereof, that if the Secretary had not, by his long silence from 1905 until 1912, in equitable contemplation actually established the limit per acre at 160 acres per entry, he did, on December 5, 1910, or sometime prior thereto, by making his report to Congress, supra, fix a limit per acre per entry within the Yuma Project, and that thereby his authority to further limit the area became exhausted and ended:

20 Cyc. 858, Note 12—and the authorities there cited.

g. Therefore, we respectfully contend that the homesteaders herein sued for by the corporate plaintiff are

entitled to the relief prayed for, at least to the extent of having their holdings not reduced below 80-acre farm units.

XVII.

THE PAYETTE-BOISE CASE.

In our 17th Ground of the First Specification of Error we challenge as erroneous that part of the decision of the Trial Court (Rec. 556) which cites as supporting authority the Payette-Boise Case, 263 Fed. 734.

a. The facts in the two cases are not even remotely alike. The Lower Court here could have very well indeed cited Paragraph numbered (1) on page 738 of 263rd Fed. Rep., set forth below in support of our 20th Ground of the First Specification of Error, Par. f, Subdivision 4, page 123, infra, as authority for finding for us and granting the relief prayed for in the complaint. We deem the leaving out of that paragraph in that portion of the Payette-Boise decision quoted in the Opinion (Rec. 556-9) as being comparable to an attempt to present the play of Hamlet without having anyone take the part of the son of the deceased King of Denmark.

b. Our evidence, documental and oral, is absolutely uncontradicted, that everyone in this case, including the engineers, believed in good faith that the Yuma Project COULD be, and WOULD be, constructed, as a whole, for the charge of not to EXCEED $40 per acre, at the extreme outside—the gross sum of $3,000,000:

See page 498 Rec. for the Supervising Engineer's avowal of good faith;

(Division XVII, Par. b.)

See page 225 for the Chief Engineer's avowal that an effort had been made to COVER ALL CONTINGENCIES, and that the ESTIMATE OF COST were liberal;

See page 226 Rec. for the official statement and determination of the Secretary of the Interior, where he positively stated that "IT APPEARS" the Yuma Project * * * can be reclaimed at a cost of less than $40 per acre.

See pages 238-9 Rec. for the statements of the members of the Board of Consulting Engineers.
And the testimonies of our witnesses:—Rec.

BONDESSON—265-267 as to the Chief Engineer and Supervising Engineer, and
275 as to his reliance thereon;

INGRAHAM—324 Rec. as to the Board of Consulting Engineers;
328-331 as to the Chief Engineer and Supervising Engineer, and
333 as to what he himself believed in and relied upon;

LYON—338-9 as to the Consulting Engineers, and
340-342 as to the Chief and Supervising Engineers;
342 as to what he himself believed in and relied upon;

CLOYD—340-346 as to the statements of the Chief and Supervising Engineers;
347 as to what he himself believed in and relied upon;

(Division XVII, Pars. b and c.)

GREER—353-4 as to the statements of the Chief and Supervising Engineer, and

354 as to what he himself believed in and relied upon.

All to the effect that they BELIEVED and relied upon the statements set forth in the PAMPHLET and the REPRESENTATIONS of the ENGINEERS that the project COULD BE, and WOULD BE, constructed for the ESTIMATED COST, and within TWO YEARS from the actual commencement of the work; and that if they had not believed in and relied upon those statements and representations they WOULD NOT have PLEDGED THEIR LAND to secure the COST of the project. And later events proved that everyone concerned had good reason to believe in and rely upon the estimates:—The contract for Laguna Dam was let for 87 per cent of the estimated cost (4th Ann. Rep. R. S. 99), and when one-half of the work was done, but little more than one-half the allotment was spent. See Pltffs' Ex. 34 (Rec. 544).

c. A very different state of facts was presented to JUDGE DIETRICH in the Payette-Boise case, as found in his decision as quoted in Rec. 556-9:

"The evidence wholly fails to establish the claim that the statements and acts of the government officials were INTENDED or UNDERSTOOD to be final or binding upon the government. By an overwhelming preponderance of the circumstantial, as well as the direct evidence, I am convinced that it was generally understood that the settlers would be required to pay the ACTUAL COST, whatever that might turn out to

be (Rec. top of page 557); the Arrowrock Dam was not thought of until long after the project was undertaken, and, of course, its cost in no wise entered into the computation upon which the earliest estimates were based. It is inconceivable that the construction of this new feature which was to add so much to the efficiency of the service would have been urged by the farmers or undertaken by the Reclamation Service at an estimated cost approximately equal to that of the rest of the system but for the assumption that those for whose benefit the work was to be done would make a reimbursement for the outlay (Rec. 557-8) * * * From all the evidence I find that the understanding was that the provision of the Act requiring the estimate to be made before commencing construction work and before settlement, would be waived and that the settlers would pay the ACTUAL COST when and after that should be determined, instead of the ESTIMATED COST to be determined by the Secretary in advance" (Rec. 558).

While it is true that frequently during the trial of the case Chief Counsel King orally urged to the Court that the plaintiffs were estopped, the word "estoppel" or the word "waiver" does not once appear in defendants' Answer; nor is there a single fact pleaded tending to show "estoppel" or waiver," nor is there a single fact proved tending to show estoppel or waiver. Therefore we contend that the citation of the Payette-Boise case, and the quotation therefrom by the Lower Court, was inept and erroneous. If, in this case, the Laguna Dam had not been included in the original plan of the Yuma Project, and thereafter we had besought the Secretary of the Interior to construct it for us, upon promises, expressed and implied, that we

should pay for its construction, at a cost of $2,000,000 or more, THEN we should say that in equity and justice we should pay for it; and we could not enjoin the defendants from shutting off our water because we refused to commence making such just payment.

XVIII.

THE SWIGART-BAKER CASE.

In our 18th Ground of the First Specification of Error we approach the very citadel of the appellees in this case—the Swigart-Baker case, 229 U. S. 187. It was contended below, and will be contended here, that the decision of this Court in that case forecloses our contention in this case; and that this Court explicitly and positively decided that the Reclamation Act SAYS and MEANS that the ACTUAL, and not the ESTIMATED, cost of construction be returned to the Reclamation Fund.

a. It is our contention that, if there was anything at all said in that case that could possibly affect this case, it was obiter dicta. In some of our arguments it may seem as if we are unwarrantably assuming that this Court knows no law; and it may very well be that some of our efforts to enlighten the Court may but tend to befog what has always been clear, and to render uncertain the certain; but in that we shall trust to the learning and sound common sense of this Court. Therefore we do not deem it necessary or wise to cite to this Court a long list of authorities that could easily be compiled dealing with obiter-dicta opinions.

(Division XVIII, Pars. a and b.)

We feel that the following, which we offer, in compliance with the rules, will neither be inept nor burdensome:

"Obiter dicta are opinion not called for by the case."

United States ex rel. Johnson vs. County Court, 96 U. S. 211.

"The opinion of a court cannot be relied upon as a binding authority, unless the case be called for its expression."

Re City Bank of New Orleans, 3 How. 292,

"Where a point has not been contested in a former decision, the court is not bound by views expressed thereon."

Cross vs. Burke, 146 U. S. 82,

"An expression of opinion upon a point not decided by the Court is a mere dictum, lacking the fore of a judicial determination."

McCormick vs. Aultman Co., 169 U. S. 606.

"An opinion given in a decision cannot be relied upon as binding authority unless the case called for its expression."

Bardes vs. First Nat. Bank, 178 U. S. 524.

b. We confidently assert the Swigart-Baker case, on the question of cost does not affect this case; that the main question there decided is not for decision here; and that anything said in that case on the question of cost does not rise even to dictum as far as this case is concerned. It simply decides that, by a fair construction of the Reclamation Act, as a whole, that the cost of

operating and maintaining a Reclamation project may be collected from off the land served, in addition to the estimated cost of construction of the project. The word "estimated" was not before the court in that csae for interpretation, and it was not interpreted. Apparently neither of Sections 2, 3 and 4 which are positively before this Court for construction, was before the Supreme Court for construction in that case, for neither of those three sections are quoted at length, while Sections 5, 6 and 10 are set forth in full in the margin of the decision (see p. 1146 Law. Ed. and p. 195 Official Report). It might be plausibly contended that Sec. 4 was not before the Supreme Court for clearly the learned Justice who wrote the opinion did not in that decision correctly quote from Sec. 4. Five times (pages 193, 194 and 197 Off. Rep., and pages 1146 and 1147 Law. Ed.) did he misquote Sec. 4, if he meant to quote it at all. Three times he probably intended to quote it (pages 193 and 197 Off. Rep.), for he places quotation marks around "cost of construction of the project," omitting the word "estimated" each time. That, at least is conclusive of one thing—that the judicial determination of the meaning of the term "estimated cost" is yet to be made by this Court. It may be also be worthy of note that in another case relied upon by defendants, U. S. vs. Cantrall, 176 Fed. 949, the learned Judge misquoted Sec. 4 by substituting the word "entire" in lieu of "estimated" cost, reading at page 953.

c. We are not unmindful of the stress laid by the this Court upon the Reclamation Fund being a revolving fund; but we suggest that it is no fault of ours

that the fund has not revolved at least one and one-third times. The trustees of the fund have been negligent—the faultless and helpless beneficiaries should not suffer. Surely, indeed, the Reclamation Fund was intended to be a revolving fund, and that all of the moneys expended, except possibly some half million per year for surveys on impracticable projects (House Doc. No. 1468, p. 14), should be returned from the lands benefitted. It has not been a revolving fund:—it is painfully apparent that it has been anything but that. But if the moneys expended have not been returned—tens of millions never will, and never can, be returned—whose fault has it been—the water users, or the agents of the government? In every instance and in every way the fault of the agents of the government. Either in lack of the most ordinary professional precautions and business foresight in undertaking projects which, if the actual cost thereof as now computed, is the fair, reasonable value, could not be constructed for three, and in some cases, four or five, times the estimated cost, or because of the adoption of the wasteful and time-killing "force account" system. A complete, intelligent, logical and workable plan was devised by the Reclamation Act to keep the fund revolving and to insure the return of all the moneys expended, and had the law, in its letter and spirit, been enforced, and the plan adhered to, the intent of the law would have been fulfilled, and the hopes of its adherents would have fructified.

d. We assert that the abandonment of the contract system, so strongly emphasized by Senator Hansbrough, Vol. 35 Cong. Rec. 1384, infra, page 98, was the cause

of all the woe, waste and waiting under the Reclamation Act, and of the fund not revolving. The contract system was strongly recommended in:

3rd Ann. Rep. R. S. 45,

as follows:

> "Most of the construction work CAN BEST BE DONE BY CONTRACT * * * Work under the so called 'Force Account' is performed on minor construction when it is impracticable to give in advance an accurate description or estimate of conditions to be encountered."

The wisdom of the contract system cannot be better exemplified than by pointing out that the estimated cost of the Laguna Dam was $918,821 (Rec. 189), and the contract was let for that work to J. G. White & Co. for the sum of $798,650, 87 per cent of the estimated cost, that bid being the lowest of nine, all of which, except one, being below the estimated cost; the highest bid of the eight below the estimate being $52,261 below it:

4th Ann. Rep. R. S. 99.

e. Another practical exemplification that Congress had devised a logical and workable scheme in providing that the ESTIMATED COST, ONLY, should be returned to the Reclamation Fund, is that, even after the contractor of the Laguna Dam was permitted to throw up its contract in the spring of 1907 (notwithstanding its bond for $160,000 to complete the work Rec. 95, Defts. Ans.)

6th Ann. Rep. R. S. 75,

and there had been six months of "Force Account," it is shown by plaintiffs' "Exhibit 34" (Rec. 544), the Secretary of the Interior, on September 25, 1907, declared over his official signature, that substantially one-half of the work on the Yuma Project had been completed, and that but little over one-half of the money set aside for its construction ($3,000,000) had been expended.

f. And we may very well, indeed, rely upon the Swigart-Baker case for support for our contentions here. In Par. 2 of the decision it refers to congressional construction placed upon the Act; and at page 198 of the official report speaks of the annual reports made by the Secretary to Congress (which we strongly rely upon) and that no adverse action was taken upon certain assessments mentioned in the reports as to O. and M. charges. We point out the express statements of the Secretary as to the advantages and meaning of the provisions of Sec. 4 concerning the returning of the estimated cost to the fund, etc. 1st Rep. 68, 2nd Rep. 30, 3rd Rep. 31, and 4th Rep. 22; hereinafter set forth in full in support of the 19th Ground of our First Specification of Error, in Division XIX of this Argument. For the first five years of the life of the Act of Secretary expressly placed the same construction on "estimated cost" that we do, and so reported to Congress, and there was no adverse action.

g. We challenge the industry of able counsel on the other side to point out when or where, at any time, since December 5, 1905, when the venerable Ethan Allen Hitchcock, as Secretary, reported to Congress that

(Division XVIII, Pars. g and h.)

> "One of the most important provisions of the law is contained in this section (4): namely, that requiring that each project undertaken shall repay the ESTIMATED cost of its construction. This is an effective safeguard against undertaking visionary or unprofitable projects, etc."

that any Secretary of the Interior, or Congress, has receded from that position, or has attempted to give a different meaning to "estimated cost."

h. The attention of Congress, as to the meaning of "estimated cost" was directly challenged in

House Doc. No. 1262, 61st Cong., 3rd Sess.,

wherein President Taft, on January 5, 1911, transmitted and approved the report of the Board of Army Engineers, appointed under the provisions of the Act of June 25, 1910, 36 Stat. 385, to examine and report upon the reclamation projects, wherein, in Par. 25, at page 17, the following appears:

> "If on the other hand, the term 'estimated cost,' as used in the act, should hereafter be judicially determined to mean the preliminary estimate made when the project was undertaken, very large losses to the fund will occur."

And we do not find that the Secretary made any report to Congress setting forth that "estimated cost meant the actual cost computed after 12 or 13 years of work; nor do we find that Congress took any adverse action, or attempted to interpret "estimated cost" in any different way than it did when the Act was enacted in 1904, as shown in support of our 20th Ground of the First Specification of Error.

(Division XVIII, Par. 1, and Division XIX, Subd. 1.)

i. Nor do we find any adverse action of Congress on the Secretary's report thereto, in

3rd Ann. Rep. 51, that

"The Yuma Project * * * involves the reclamation of about 130,000 acres at $40 per acre."

Nor any adverse action on his report in

4th Ann. Rep. 97,

where he states: "The ESTIMATED COST of the project * * * is $3,000.000."

Therefore, is not the estimated cost of the Yuma Project fixed by law, as construed by Congress, at $40 per acre—$3,000,000?

XIX.

CONGRESS INTENDED THE ESTIMATED COST TO BE RETURNED TO RECLAMATION FUND.

Our 19th Ground of the First Specification of Error attacks the finding and decision of the Trial Court (Rec. 553) that Congress intended that the actual, and not the estimated, cost of the construction of all irrigation projects under the Reclamation Act should be assessed against the lands, and paid into the Reclamation Fund, and in that we reach one of the most vital questions in this case, and we offer the following in support of our contention that the Trial Court erred in so doing:

(Division XIX, Subd. 1, Par. a.)

1.

THE COMMON AND DICTIONARY MEANING OF ESTIMATED:

Before determining what Congress intended, let us see what the word "estimated," or "estimate," means:

a. If we were to ask the man in the street, in the office, in the school—anywhere—the meaning of the "estimated cost" of the construction of a building, or other structure, we should receive the instant and unhesitating reply that it is the amount figured out in advance of the actual construction by the owner, architect, engineer, or contractor. If we search the dictionaries for a more accurate definition we find in

> Webster's New International: Estimate v. t. estimated (Latin, aestimatus, p. p. of aestimare). (See Esteem (which gives, "to value," as the meaning of L. estimare).
>
> 1. To form an OPINION, to guage, to judge.
> 2. To fix the worth, value, size, extent, etc., ESPECIALLY ROUGHLY or in a GENERAL way; to appraise, to estimate the value of land. * * *
> 3. To calculate APPROXIMATELY some particulars of, AS THE PRICE TO BE CHARGED FOR WORK * * * etc., as to estimate a job of printing. * * *
>
> Estimate, N., 1., a value or rating, ESPECIALLY FROM INCOMPLETE DATA; ROUGH or APPROXIMATE calculation; as, an ESTIMATE of the COST of a building.

(Division XIX, Subd.'s 1 and 2.)

2. A STATEMENT of the AMOUNT for which certian work WILL BE DONE by one who wishes to do it. * * *

Syn.: * * * An estimate is AN APPROXIMATE JUDGMENT of value, etc.
Estimation, N.

3. An opinion or judgment of worth, etc., of anything, ESPECIALLY if formed without using precise data. * * *

and to like effect, in slightly varying language, are all the other dictionaries. All definitions excluding the thought that an estimate of cost, or estimated cost, can possibly mean the determined price of a structure after its completion and all the actual, or the real, cost has been accurately entered in a ledger and added up and the gross sum accurately computed and settled. In every case it conveys the meaning of a previous computation.

2.

HOW THE COURTS HAVE DEFINED "ESTIMATED."

We should next inquire what meaning the Courts have given to those words, before determining what Congress intended, for a vast majority of the members of Congress are learned lawyers, and no doubt some of them, at least, when they voted for the Reclamation Act of 1902, must have had in mind how the Courts had defined those words. We find that the Courts, prior and subsequent to the passage of the Reclamation Act, had spoken as follows:

"The word 'estimate' precludes accuracy."—Shipman vs. State, 43 Wis., 381.

"To 'estimate' means to judge and form an opinion of the values from imperfect data; to fix the worth of roughly or in a general way."—McCormick vs. State, 61 N. W., 99.

"The ordinary meaning of 'estimate' is to calculate roughly, or to form an opinion as to the amount from imperfect data. In this sense, the term 'estimated capacity of a car' means substantially the SUPPOSED or PROBABLE capacity of the car."—Lousville, etc., Ry Co. vs. Chandler, 72 S. W., 805.

"The word 'estimate' percludes accuracy, and its ordinary meaning is to calculate roughly or to form an opinion from imperfect data, and the word 'estimate' has no more certainty that the word 'about' or 'more or less' "—Bautovich vs. Lumber Co., 56 So. 1026.

" 'Estimate' as defined by Webster is to judge and form an opinion of the value of, from imperfect data; to fix the worth roughly or in a general way."—National, etc., Ins. Co. vs. Duncan, 98 Pac. 634.

"The word 'estimate' in a law requiring a City Council, before making a contract for building bridges, etc., an ESTIMATE OF THE COST thereof shall be made by the proper officer, and submitted to the Council, and no contract shall be entered into for the work for a price exceeding the 'estimate' does not mean a correct statement of the cost of such work, but an approximation of such costs * * *.'—City of Booneville vs. Rogers, 101 S. W. 1120.

"The term 'estimates' is NOT an appropriate expression to indicate the DETERMINATION of the

(Division XIX, Subd's. 2 and 3, Par. a.)

COST of PAST CONSTRUCTION."—O'Connell vs. Behan, 124 Pac. 1038

"Where the law requires an engineer's 'estimate of the cost' of paving before a contract is made, the word 'estimate' means the fixing of the worth or value roughly or in a general way, sometimes from imperfect data."—City vs. Stephens, 141 S. W. 1111.

"An 'estimate' means a rough calculation."—Gratz vs. City, 145 S. W. 870.

"'Estimate' is a valuation based on opinion and roughly made from imperfect data."—Brown vs. Cornwell, 60 SE. 623.

"The word 'estimate' is one of common use, and is therefore to be taken in its natural, plain, obvious and ordinary signification."—Lewis Sutherland Stat. Const. Sec. 358, 2nd Ed.

We contend that "estimated cost of construction" is its own best definition; it means just what it says; and it clearly and positively does NOT mean the computed actual, real cost of construction determined after twelve years of active work, but means in this case the original estimate of cost made 13 years before, in May, 1904.

3.

WHAT CONGRESS UNDERSTOOD BY "ESTIMATED COST":

We believe that the following record and proceedings of Congress show that it fully understood the meaning of the words "estimated cost," and that it clearly intended that it was the estimated, and not the actual, cost

that was to be charged against the lands benefitted, and returned into the Reclamation Fund.

a. Senator Hansbrough had the Reclamation Bill in charge in the U. S. Senate February 6, 1902, and we find the following colloquy between him and Senator Spooner in

Vol. 35 Cong. Rec. Part 2, Page 1384

Mr. SPOONER (Wis.)—Will the Senator allow me to ask him a question?

Mr. H.—Certainly.

Mr. S.—Is the Senator speaking of a bill that has been reported?

Mr. H.—It has been reported from the Committee on Public Lands.

Mr. S.—If I may inquire of the Senator, does the bill provide for the appropriation to the various arid land State and Territories of the proceeds of the sales of arid lands?

Mr. H.—The proceeds from the sale of the lands in those States and Territories.

Mr. S.—Who is to expend the money?

Mr. H.—The Secretary of the Interior.

Mr. S.—It has to be done by the National Government?

Mr. H.—Yes, sir.

Mr. S.—BY CONTRACT?

Mr. H.—BY CONTRACT.

Mr. S.—Are those contracts limited in amount to the proceeds in the Treasury for that purpose?

Mr. H.—Absolutely! There is a provision in the bill to the effect that no contract shall be made for an amount exceeding the amount of money in the Reclamation Fund.

(Division XIX, Subd. 3, Par. a.)

And in the same speech, on the succeeding page of the same record, the following appears:

> "A system of reclamation is practicable only in the sense that certain broad principles are to be clearly established as to what classes of works may be built by the government. Each individual project should be weighed on its merits and with reference to these principles. Each large item should be considered and the construction of the work authorized only AFTER CAREFUL EXAMINATION AND REPORT by impartial experts. Such reports should show the location, capacity, COST, and benefits to be derived."

We contend that, the "cost" referred to by the Senator in charge of the bill, to be shown by the reports of impartial experts after CAREFUL EXAMINATION, without which no work should be authorized, is the "estimated cost of construction" figured out in advance of the determination of the practicability of the project, and not the actual or real cost computed 13 years thereafter. At that time the Senate Bill did not have appended to Section 3 thereof the proviso that now appears in Section 3 of the Act, requiring the Secretary of the Interior, upon the completion of the surveys and the necessary maps, etc., to determine if projects were practical and advisable.

Report No. 254 of the Senate, Jan. 20, 1902.

That proviso was added in the House by the Committee on Irrigation of Arid Lands: See

H. R. Report No. 1468, p. 17.

(Division XIX, Subd. 3, Par. b.)

b. We deem it significant that the language: "that such surveys should be prosecuted diligently to completion, and upon the completion thereof, and the necessary maps, plans and ESTIMATES OF COST, the Secretary of the Interior shall determine whether or not said project is PRACTICAL and ADVISABLE," was not then in the bill, when Senator Hansbrough spoke in the Senate as above quoted. It is also significant that Section 4, when Senator Hansbrough spoke, was not in the form finally enacted, but was entirely rewritten in the House. See

H. R. Report 1468, page 17.

We have emphasized the word "CONTRACT" by capitalization, in the foregoing colloquy between the two Senators; for we believe that this law suit and many other unnecessary woes have flowed from the disregard by the Reclamation Service of what is certainly the spirit of the law as set forth in that colloquy. The abandonment of the policy FIRST ADOPTED BY THE RECLAMATION SERVICE of letting contracts and the adoption of the plan of doing the work by days labor and the direct purchase of materials by the government, under what has become to be technically known in U. S. Reclamation circles as "FORCE ACCOUNT," permitted and encouraged by the opinion of the Assistant Attorney General on April 16, 1906, published in the 34 L. D. 567, has led the government into a maze of inefficiency and extravagence in the reclamation of arid lands; and because someone, either the government on the one hand, or the settler on the other hand, is bound to suffer loss, has led to such harsh decisions as we be-

lieve the Lower Court rendered in this case. But even if the bill as urged by Senator Hansbrough had been enacted into the law as it then read, to the effect that reclamation projects should only be authorized AFTER CAREFUL EXAMINATION AND REPORT BY IMPARTIAL EXPERTS, showing the location, capacity, cost, and the benefits to be derived therefrom, and that the expenditures would have to be made under CONTRACT, we contend that no reasonable person could plausibly contend, in view of the well established meaning of the word "estimated," that Congress intended that the ACTUAL cost of the project should be returned and not the ESTIMATED cost: and such contention, as we see it, is impossible in face of the House amendments and the law as finally enacted.

c. When we follow the bill into the House we find it there amended as to Sections 2, 3 and 4 as finally enacted, which we here set forth for the convenience of the Court:

"Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, be-

fore giving the public notice provided for in Sec. 4 of the act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided, that the commutation provisions of the homestead laws shall not apply to entries made under this act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary

(Division XIX, Subd. 3, Par. c.)

funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon the lands in private ownership which may be irrigated by the waters of ths said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

We find the following from the Majority Report of the House Committee on the Irrigation of Arid Lands:

H. Report 1468, supra, p. 11,

"Neither can irrigation enterprises, great or small, particularly those of the character which the government would undertake, be projected without DUE AND CAREFUL EXAMINATION, or completed in a brief period of time."

And Mr. Mondell, who had the bill in charge in the House spoke, among other things, at

Vol. 35 Cong. Rec. Part 7, page 6678,

as follows:

"It having been ascertained that a sufficient supply of water for the irrigation of the lands in question

was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located. He would THEN ESTIMATE THE COST OF THE PROPOSED WORKS, and having determined upon their construction would advertise for bids for same, and would thereupon give notice of the limit of area per entry under the particular project, which limit under the provisions of the act would represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question. At the same time notice would be given of the charges to be made per acre upon each entry and upon lands in private ownership which might be irrigated by the waters of the works in question, which charges are to be determined with a view of returning to the reclamation fund the cost of construction, and be apportioned equitably.

"The notice above referred to having been given, all entrymen on the lands proposed to be irrigated are bound by its provisions and all entries of the public lands subject thereto. The work of construction having been inaugurated, it is expected that settlers under a project would be able to secure employment thereon and thus support themselves until such times as water was available for their lands and crops could be produced."

But more significent yet is the Minority Report of the House Committee on Irrigation of Arid Lands, H. Report 794, signed by Congressman Ray and Jenkins, set forth in:

Vol. 35 Cong. Rec. Part 7, pp. 6693-6.

Mr. Ray, of New York, led the opposition to the bill, and, on June 12, 1902, he made an extended and forcible speech against it:

Vol. 35 Con. Rec. Part 7, pp. 6682-93,

in which he assailed it from every angle. He took the report of the U. S. Geological Survey on the Milk River, Montana, Project (then purely speculative, of course, as there was no law under, or money with which, to construct it), and he read the report into his speech, dissecting and adversely criticising it as he went along, and he set forth therein the following Estimate of Cost, as it is copied from the foot of the second column in:

Vol. 35 Cong. Rec. Part 7, p. 6683.

ESTIMATED COST OF ST. MARY DAM AND CANAL SOUTH FORK TO MILK RIVER

Dam	$ 22,000
Tunnel	12,000
Head Gates	10,000
Head to Spider Lake	245,000
Spider Lake to North Fork of Milk River	288,400
Two sets of water gates	4,000
Siphon, North Fork	67,000
North Fork to South Fork Milk River	360,800
	$1,009,300
Contingencies	109,000
Engineering	54,700
Total	$1,173,000

(Which bears a striking resemblance to many of the estimates made for the Yuma Project on pp. 164 to 198, Rec.)

Thereby giving Congress an autopic demonstration of the meaning of "Estimated Cost." He appended to his speech the Minority Report of his committee, H. Report 794, from which the following is taken at p. 6693 of the same volume of the Cong. Rec.

> "The cost of construction, maintenance and operating one of the reservoirs may be ESTIMATED; but any estimate will be far from the ACTUAL EXPENSE. If the government commences the construction of such reservoirs at different points and the proceeds of the sales of public lands are exhausted before they are COMPLETED and put in operation, a demand will immediately be made for an appropriation out of the Public Treasury on the plea that the government having gone into the business of irrigation, and having expended millions for incompleted work, such works must be preserved and completed in order to be of any value whatever. Such pleas are usually successful, but the result would be either that the government must abandon its incomplete work, or tax all the people for the benefit of a locality."

That statement is not only prophetic, but it is certainly a challenge to the advocates of the bill to explain, as is now earnestly contended by the appellees here, and as has been decided by the Lower Courts that the bill (and the Act), did not mean what it says. No advocate of the bill arose in his place to advise the gentleman from New York that he was entirely mistaken as to the meaning of the words "Estimated Cost;" that the word "Estimated" as used in the bill, whatever had been its natural, plain, obvious and ordinary signification; and no matter how the dictionaries had defined it, and how the Courts had construed it; and no matter

what might be the natural, plain, obvious and ordinary signification of that word in the future, and no matter how the dictionaries would define it, or how all courts (except U. S. Courts), should construe it, the secret meaning of the words "Estimated Cost" in the bill was the ACTUAL COMPUTED COST arrived at by the Director of the Reclamation Service some thirteen years after some particular project should have been commenced; and that the word thereupon in the same Section 4 of the bill did not mean "IMMEDIATELY AFTER," but some thirteen years thereafter; and that really the fears of the gentleman from New York were entirely unfounded, and that there was no possible chance of the "estimate" being far from the actual expense." Nor did any advocate of the bill advise the gentleman from New York, in effect that: "It is true that the owners of private lands, and the settlers upon public lands, will be led to believe that the bill means what it says, and that the words 'estimated cost' can have no other meaning than their natural plain, obvious and ordinary signification; and the landowners will be induced to mortgage their homes to pay the originally estimated cost, believing in and relying upon the representations of the high officials of the Interior Department that the act means what it says; and that they, the high officials, had endeavored "to cover all contingencies, and the estimates of cost have been liberal" (Trans. of Rec. p. 225); but that thereafter the mortgagors, and their successors in title would ascertain, after some thirteen years of waste and waiting, that the

act would not mean what it says, and that the finally computed, ACTUAL COST would have to be paid, even though it should be more than twice the ESTIMATED COST." No such shocking, Machiavelian doctrine was announced; and within five days thereafter the bill became a law; and we respectfully contend that it means what it says, and that the Lower Courts erred in holding that Congress intended that the ACTUAL, and not the ESTIMATED, cost should be returned into the Reclamation Fund.

(Division XX, Subd. 1.)

XX.

HOW "ESTIMATED COST" SHOULD BE CONSTRUED.

In our 20th Ground of the First Specification of Error we attack somewhat the same holding of the Trial Court as that set forth in the 19th Ground, couched in somewhat different language, with the additional holding that the term "Estimated Cost" must be interpreted and construed so that the entire cost of construction must be returned to the Reclamation Fund (Rec. 554). In support of this specification we advance the propositions that the Reclamation Act is self-explanatory; that the intent of the law-makers having been ascertained that intent must be put into effect that its terms are so unambiguous as to forbid interpretation; and that, even if there were any doubt on either of those three propositions, the act has been so frequently construed by the officer whose duty it was to enforce it, and others, as to take the question of its interpretation and construction out of the realm of controversy, as follows:

1.

THE RECLAMATION ACT ITSELF CONSTRUES "ESTIMATED COST."

(a) Instead of the Reclamation Act by its own terms raising a doubt as to the meaning of "the estimated cost of construction," Sec. 2 thereof clearly and unequivocably sustains our contention that "the estimated cost" means the estimated cost determined PRIOR to the beginning of the work, and not some computed, in whole or in part, actual or real, cost figured out 13 years later. Sec. 2 requires the Secretary of the

(Division XX, Subd. 1, Par. a and b.)

Interior to report to Congress each year the results of the surveys, etc., giving ESTIMATES of COST of all CONTEMPLATED works? * * *; ALSO THE COST of works in process of construction as well as those which have been completed." And again in Sec. 3 it is provided that the surveys shall be prosecuted diligently to completion, and upon completion thereof, and the necessary maps, PLANS AND ESTIMATES OF COST, the Secretary of the Interior shall determine whether or not the porject is PRACTICABLE AND ADVISABLE. That provision points absolutely and irrevocably to when the estimated cost of construction shall be determined PRIOR to the determination of the practicability and advisability of undertaking the work. And in the very nature of things that must be the time to fix the estimated cost of construction; for while a project might be entirely practicable as an engineering feat, its advisability could only be determined in view of what it was going to cost.

b. Then Sec. 4, provides that UPON the DETERMINATION by the Secretary that the project is practicable he shall give notice, etc., of the charges, etc., per acre, etc. SAID CHARGES shall be DETERMINED WITH A VIEW of returning to Reclamation Fund the ESTIMATED COST of the construction of the project. That language so plain, simple and unambiguous that but one meaning can be taken from it—that is, that when ever the charges are fixed that they shall be determined so that the estimated cost, and the estimated cost ONLY, shall be paid back into the Reclamation Fund.

2.

THE LEGISLATIVE INTENT HAVING BEEN ASCERTAINED, THAT INTENT SHOULD BE GIVEN EFFECT.

(a) We believe that we have clearly shown in the preceding, 19th, division of this argument, and in the preceding subdivision 1 hereof, that Congress intended that only the estimated cost should be returned into the Reclamation Fund:

"The INTENT is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that INTENT."

Lewis Suth. Stat. Constr., Sec. 363—citing:
U. S. vs. Chase, 135 U. S. 255,
Wis., etc., R. Co. vs. Forsythe, 159 U. S. 46,
McKee vs. U. S., 164 U. S. 287,
U. S. vs. Goldenberg, 168 U. S. 95,
Hawaii vs. Mankichi, 190 U. S. 190,
with numerous other Federal and State authorities.

"The INTENTION of the legislature in enacting the law is the LAW ITSELF, and must be enforced when ascertained."

Ibid. Sec. 363—citing:
Edwards vs. Morton, 92 Tex. 152; 46 So. W. 792.

3.

WHEN THE MEANING OF THE STATUTE IS PLAIN IT MUST BE FOLLOWED.

(a) Even if we had not ascertained the INTENT of Congress in enacting the Reclamation Act its terms are so plain, certain and unambiguous, as we contend, that there is nothing for the courts to do but to enforce the statute as it reads. As heretofore pointed out in sub-

divisions 1 and 2 of the 19th Division of this argument, supra, pp....., ESTIMATED COST can have but one possible meaning in this case, and that is, SOME SUM LESS THAN FORTY DOLLARS PER ACRE, as declared by the Secretary in his official announcement, under date of May 10, 1904 (Plaintiffs.' "Exhibit 4" Rec. 201).

> "If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless."
>
> Lewis Suth, Stat. of Constr., Sec. 363—citing:
> U. S. vs. Hartwell, 6 Wall. 385-95,
> Ogden vs. Strong, Fed. Cas. 10460,
> U. S. vs. Wiltberger, 5 Wheat. 95,
> Ruggles vs. Illinois, 108 U. S. 526,
> and numerous other authorities.
>
> "It is beyond question the duty of courts in construing statutes to give effect to the INTENT of the law-making power, and seek for that INTENT in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and EXPRESS PLAINLY, CLEARLY and DISTINCTLY the SENSE of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation.' The statute itself furnishes the best means of its own exposition; and if the SENSE in which words were intended to be used can be clearly ascertained from its parts and provisions, the INTENTION thus indicated will prevail without resorting to other means of aiding in the construction. Very strong expressions have been used by the courts to emphasize

the principle that they are to derive their knowledge of the LEGISLATIVE INTENTION from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived."

Ibid. Sec. 366—citing:

Schooner Pauline vs. U. S., 7 Cranch 152,

Denn vs. Reid, 10 Pet. 524,

Gardner vs. Collins, 2 Pet. 58,

Sturgis vs. Crowninshield, 4 Wheat. 202,

and numerous State authorities.

"The legislature must be understood to mean what it has plainly expressed, and this excuses construction."

Ibid. Sec. 366:

U. S. vs. Fisher, 2 Cranch 358,

U. S. vs. Hartwell, supra,

Denn vs. Reid, supra.

"'When the INTENTION of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction. It is not allowable to interpret what has no need of interpretation. To attempt to do so would be to exercise judicial functions. There is no safer or better settled canon of interpretation than that when language is clear and unambigous it must be held to mean what in plainly expresses.' These views of eminent courts are supported by numerous cases."

Ibid. Sec. 367—citing:

Swarts vs. Siegel, 54 C. C. A. 399,

Yerke vs. U. S., 173 U. S. 439,

Hamilton vs. Rathbone, 175 U. S. 414,

and numerous other State and Federal authorities.

(Division XX, Subd. 4, Par. a.)

4.

HOW "ESTIMATED COST" HAS BEEN INTERPRETED.

While we believe that we have conclusivelly shown that it is plain that the INTENT of Congress, in the passage of the Reclamation Act, was that the ESTIMATED, and not the ACTUAL, cost, should be returned; and have shown that even if the INTENT of Congress had not been ascertained the language of the statute is so plain, certain and unambiguous that but one construction can be given to it.

(a) Yet if there should be even a lingering doubt on either of those propositions we take the position that the Secretary of the Interior, whose duty it was to enforce the act, did frequently in the years 1902-3-4 and 5 himself give the same interpretation to the act as to the meaning of "Estimated Cost," that we now contend for:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authority need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."
>
> Pennoyer vs. McConaughy, 140 U. S. 125,
>
> United States vs. Moore, 95 U. S. 760, 763.

Also do we understand it to be the doctrine laid down in:

so strongly relied upon by the appellees. In obedience to the commands of Section 2 of the Reclamation Act, the Secretary of the Interior made his First Report to Congress on December 3, 1902, the first Report being a volume of 317 pages. Those reports have been made annually up to the present time; the 15th being made in December, 1916, in a volumne of over 800 pages. Beginning with the First Report, Dec., 1902, at page 13 thereof taken from the letter of transmittal from the Director of the U. S. Geological Survey, then in charge of the operations under the Reclamation Act, we find the following:

"In nearly every locality there are alternative methods of reaching the desired end, the relative merits of which cannot be determined until careful ESTIMATES have been made," and

"The final determination of the reclaimable area rests upon a summation of ALL OF THE FACTS OF FEASIBILITY AND COST, so that it can be stated only as the last of series of ESTIMATES. That is to say, in each project the conditions are being sifted down to a condition where judgment must be exercised whether, for instance, it is better to reclaim a certain body of good land at a cost of $12 per acre or a larger body of less valuable land at $10 per acre. This final judgment can only be passed when all of the FACTS OF COST OF EACH DETAIL, expense of maintenance, the permanence of structures, the character of soil and climate HAVE BEEN WORKED OUT WITH GREAT CARE."

(Division XX, Subd. 4, Par. a.)

We find the following in

First Report R. S. p. 68, under "Cost per Acre,"

"After determining upon construction the Secretary of the Interior is required to give public notice of the lands to be irrigated under the project and of the limitation of area per entry which he may deem advisable and which shall be such as may be reasonably required for the support of a family upon the particular lands involved. This notice will also prescribe the charges wich are to be made per acre upon said entries and upon land in private ownership, which may be irrigated by the waters supplies from the said works. He will also prescribe at this time the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when the payments shall commence. It is provided that in fixing the charges per acre, the sum shall be determined with a view of returning to the Reclamation Fund THE ESTIMATED COST OF THE PROJECT, and the same is to be apportioned equitably."

We find the following in 2nd Ann. Rep. R. S. 30

"The Secretary is also to determine the charges which should be made per acre upon the entries and upon lands in private ownership which may be irrigated. These charges are to be determined with a view of returning to the Reclamation Fund the ESTIMATED COST OF CONSTRUCTION. This is believed to be one of the most important limitations

and safeguards of the law, since it puts the whole matter of reclamation upon a strictly business basis and guards against wasteful or useless construction. Without this provision it would be almost impossible to administer the law fairly, since it would leave open the door to other influences than those of merit alone. It is believed that this matter of refunding the cost should be made at all times the prime requisite in any project, and that NO UNDERTAKING SHOULD BE BEGUN WHERE IT IS NOT REASONABLY SURE THAT THE COST WILL BE REFUNDED WITHIN A SHORT TIME."

In the next two Reports we find the following:

3rd Ann. Rep. R. S., p. 31, 1904,

"One of the most important provisions of the law is contained in this section, namely, that requiring these payments of the ESTIMATED cost of construction. This is an effective safeguard against undertaking visionary or unprofitable operations, and puts the operations under the law on a sound basis. The fact that each project must return its costs puts out of consideration at once a large number of dubious or chimerical schemes that are continually being exploited and removes the temptation to try expensive experiments."

And we find almost precisely the same language in the

4th Ann. Rep. R. S., pp 22 and 23,

as follows:

"One of the most important provisions of the law is contained in this section, namely, that requiring

that each project undertaken shall repay the ESTIMATED cost of construction. This is an effective safeguard against undertakings visionary or unprofitable projects, and puts the operations under the law on a sound basis. The fact that each project must return its cost cuts out of consideration at once a large number of dubious or chimerical schemes that are continually being exploited, and removes the temptation to try expensive experiments."

(b) Those last three declarations of the Secretary are, we contend, conclusive of what was in the mind of that officer in the years 1903, 1904, and 1905. The cost of construction should be estimated before the beginning of any undertaking so that it would be REASONABLY SURE that the cost would be refunded; which would also be a guard against WASTEFUL and USELESS construction, and an EFFECTIVE SAFEGUARD against undertaking VISIONARY or UNPROFITABLE SCHEMES, and removes the TEMPTATION to try EXPENSIVE EXPERIMENTS. Can it, we ask, be sanely urged that the Secretary could have had in mind that all sorts of projects, wasteful, useless, visionary, unprofitable, dubious, chimerical, expensive and experimental, or what-not, should be undertaken without the estimated cost of construction being determined and without any reasonable assurance that the projects or any of them, including the irrigable lands embraced therein, would be worth the actual cost of construction, and that work should continue thereon for thirteen years before the cost would be computed and the owners of the pri-

vate lands therein, who had mortgaged their lands half a generation before, to secure the payment of the "estimated cost," informed of the amount of their mortgages. The mere statement of such an appalling absurdity is its own refutation.

(c) It is significant and worthy of note that no such declaration of the Secretary appeared in his reports to Congress after the Fourth Report on December 5, 1905. Immediately thereafter there was a change of policy on part of the Reclamation Service. The phrase "force account," theretofore, and now, unknown to the lexicons, was created, or, at least, seen written in publications referring to the work of the Reclamation Service; and on April 16, 1906, the Asistant Attorney General to the Secretary of the Interior furnished a learned and elaborate opinion to that officer,

34 L. D. 567,

to the effect that "may" in Sec. 4, relating to the letting of contracts, did not mean must, and that "force account" was legal.

(d) But the Secretary of the Interior was not alone in his iterpretation of the meaning of the words "Estimated cost." Later, Jan. 1910, there was a joint committee of both houses of Congress created for the purpose of investigating the Department of the Interior and the Reclamation Service. This committee, consisting of Senators Knute Nelson, Frank P. Flint, George Sutherland and Elihu Root, and Representatives Samuel W. McCall, Marlin E. Olmsted and Edwin Denby, et al, in dealing with the provisions of Section 4 of the Recla-

mation Act, and giving the Public Notice of the charges per acre, etc., we find the following language in their majority report, see:

Senate Doc. No. 719, page 68, 61st Cong, 3rd Ses.

"The object of this important provision is to advise the settlers as to the cost per acre of the lands they contemplate entering under the homestead law, as well as other landowners, before obligating themselves to pay their share of the cost. The rate may be so high that the homestead settler can not see his way clear to enter the land at such cost, and the private landowner may regard the cost as greater than he can stand or is willing to obligate himself to pay."

Continuing further on pages 84 to 85 of said report, the committee said:

"Under the law, as we have already pointed out, at the time a project is adopted and contracts let for the work, notice must be given to homestead settlers and to private owners of the estimated cost per acre which will be entailed by the construction and completion of the project upon the lands to be irrigated, to the end that the settlers and private owners may be advised in advance as to the ultimate cost of their lands. From the evidence it appears that the estimates of cost thus given have in some instances been far below the ultimate and real cost. The following is an example of this, as appears from the following testimony:"

(Here follows, in the Report, some excerpts from a proceeding where Mr. A. P. Davis of the Reclamation Service testified concerning the original estimate of cost of the Klamath Project being $20 per acre, and it being finally announced by the Secretary of the Interior at $39 per acre.)

Whereupon the committee expresses itself as follows:

"A SMALL DISCREPANCY MAY BE AND IS IN THE NATURE OF THE CASE UNAVOIDABLE, BUT SUCH WIDE DIFFERENCES AS APPEAR IN THE INSTANCE CITED SEEM UNJUSTIFIABLE."

The distinguished names signed to that report should give it some weight.

(e) By 1910 the Reclamation Service had got into deep water financially, and in accordance with the provisions of the Act of June 25, 1910 (36 Stat. 835), a Board of Army Engineer Officers of the United States Army was appointed to examine all reclamation projects and to make recommendations concerning the expenditure of the $20,000,000 realized in Certificates of Indebtedness to be isued under the act. The board was convened by special order No. 156, War Department, July 6, 1910, with directions to report to the Secretary of the Interior. During the summer of 1910 they made examinations of the various projects; and among other matters that board reported, as follows, in:

House Doc. 1262, 61st Cong. 3rd Sess. page 17.

25. RETURNS TO THE RECLAMATION FUND.

"The Reclamation Act contemplates the return to the fund of the estimated cost of the different proj-

ects and the work has been prosecuted on that basis. The estimated cost is held by the Reclamation Service to be that officially announced by the Secretary of the Interior when the project is opened, not the preliminary estimates made when he project was undertaken, as was assumed by many of the owners of private lands within the projects. On the assumption that the announced building charge is the estimated cost contemplated by the act, the losses to the Reclamation Fund, except on four of the projects, which will be referred to heareafter, will be relatively small, though, by reason of the projects undertaken, the repayments will extend over many years. IF, ON THE OTHER HAND, THE TERM "ESTIMATED COST," AS USED IN THE ACT, SHOULD HEREAFTER BE JUDICIALLY DETERMINED TO MEAN THE PRIMARILY ESTIMATE MADE WHEN THE PROJECT WAS UNDERTAKEN, VERY LARGE LOSSES TO THE FUND WILL OCCUR."

There certainly will be loss if the term "Estimated Cost" is given its "natural, plain, obvious and ordinary signification;" but that loss should fall upon the government of the United States, which has been unfortunate in the selection of its agents and employes, and it should not fall upon the FAULTLESS and HELPLESS WATER USER who mortgaged his land to SECURE THE PAYMENT OF THE "ESTIMATED COST."

(f) Before the decision in this case by Judge Sawtelle, on July 21, 1919, JUDGE DIETRICH, of the U.

(Division XX, Subd. 4, Par. f.)

S. District Court of Idaho, in

Payette-Boise W. U. Assn., vs. Cole, 263 Fed. 734 (which is cited, with some confidence, in the opinion in this case—Rec. 556 to 560), judicially determined that the term "Estimated Cost," as used in the Reclamation Act, means the PRELIMINARY ESTIMATE made when the project was undertaken, in the following language, which does not appear in the opinion of the Trial Judge, reading at page 738 Federal Reporter (first setting out, at page 733, the plaintiffs' contention, which is ours, that the Secretary was without power to fix the new and higher charges. See p. 556, Rec.):

"(1) But first as to the law:—Generally speaking, it is thought that plaintiffs' construction of Section 4 of the act is correct. The primary purpose of the law„ of course is to secure the settlement and reclamation of arid public lands. In its administration the first step is an investigation for the purpose of determining the feasibility of a propsed project. Such investigation necessarily involves some consideration of the probable cost, but apparently Congress was not content to have the Secretary base his estimate upon the opinion of engineers alone; he is first to let contracts for construction, and then he is to estimate the probable cost, and equitably apportion it to the lands to be reclaimed. Of this estimate and apportionment he is to give public notice, and thereupon prospective settlers may determine for themselves whether they will or will not settle upon the lands, and thus bind them-

selves to pay the published price for water. In case of settlement under such conditions, it is incompetent for the Secretary to increase the price at a later date, even if it turns out that the published estimate is insufficient to cover the actual cost."

That construction of the U. S. District Court of Idaho, we contend, is in consononce with the INTENT OF CONGRESS, the ORIGINAL INTERPRETATION of the Secretary of the Interior himself, the construction placed upon the act by the CONGRESSIONAL COMMITTEE, consisting of Senator Root and others, and with common sense, natural justice and equity.

XXI.

SECRETARY'S POWER TO "ESTIMATE" THE COST EXERCISED IN 1904—"FUNCTUS OFFICIO" IN 1917.

In support of our 21st ground of the First Specification of Error, that the Trial Court erred (Rec. 555) in holding the cost to have been estimated in 1917, we make the same contention that was made by the plaintiffs in the Payett-Boise case, supra, as stated by Judge Dietrich, that on April 6, 1917, the Secretary of the Interior was wholly without power to establish the charges of $75 per acre, for the reason that the time had passed for taking such action and that the authority conferred by law had been once exercised, and was functus officio; and in support of that contention we present the following:

1.

WHAT THE LAW REQUIRES TO BE DONE.

We should first carefully consider the Reclamation

Act, and ascertain its directions as to how and when the charges per acre should be DETERMINED and FIXED:

(a) Sec. 2 AUTHORIZES and DIRECTS the Secretary of the Interior to make EXAMINATIONS and SURVEYS for irrigation works etc., and to report to Congress at the beginning of each regular session the results thereof, giving ESTIMATES OF COST of all CONTEMPLATED works, the QUANTITY, etc., of the land to be irrigated, and all FACTS relative to the PRACTICABILITY of each irrigation project; also the COST of the works in PROGRESS as well as those CONTEMPLATED.

(b) Sec. 3 provides that said surveys should be PROSECUTED DILIGENTLY to COMPLETION; and UPON the completion thereof and of the NECESSARY MAPS, PLANS and ESTIMATES OF COST the Secretary of the Interior shall DETERMINE whether or not said project is PRACTICAL and ADVISABLE.

(c) That UPON the DETERMINATION by the Secretary that any irrigation project is PRACTICABLE he may cause contracts to be let, etc., and THEREUPON he shall give public notice of the lands irrigable under such projects, etc.; also of the CHARGES which shall be made PER ACRE upon the entries and lands in private ownership within the project; and the said CHARGES shall be DETERMINED with a view of returning to the Reclamation Fund the ESTIMAETD COST of the construction of the project.

(d) We contend that the word "upon" in Section 3

where the Secretary is directed, "UPON THE COMPLETION OF THE SURVEYS" to DETERMINE the practicability of the project; and in Sec. 4 where the Secretary is directed, "upon" such determination, to give notice of the charges, etc., is an adverb of time, and means, "as soon as" or "at the time of" those happenings: That is in one case UPON THE COMPLETION OF THE SURVEY, and in the other UPON THE SECRETARY'S DETERMINATION OF THE PRACTIBILITY OF THE PROJECT:

Smith vs. Nesbitt, 2 Man. G. & S. 286, 287.
Brown vs. Clough, 39 Me. 566.

(e) Going back to the declaration of the Secretary of the Interior in the First Rep. R. S. p. 68, in the 4th subdivision of the 20th Division of this argument, page 116, supra, we notice that the Secretary of the Interior set forth that it was his duty "after determining upon" the construction of any project to give the notice required by Sec. 4 and to prescribe therein the charges to be made per acre, etc. The word "after" used there is also, we contend, an adverb of time, and means "immediately after:" See

Dowing vs. Wherrin, 49 Am. Dec. 139,
Theo. Seminary vs. Kellog, 16 N. Y. 83,
Appeal of Penn. Co. 10 Atl. 130,
In Re Swinbourne, 14 Atl. 850.

2.

THE SECRETARY DETERMINED THE FEASIBILITY OF THE PROJECT.

(a) The next inquiry will be if the Secretary, as re-

quired by Sec. 2, made EXAMINATIONS and SURVEYS and LOCATED the Yuma Project. We take it that the appellees will themselves answer that inquiry in the affirmative, but in the event that they do not, we point to:

3rd Ann. Rep. R. S. pp. 192 and 199.

made to Congress in December, 1904, which shows that in 1902-3, topographical maps had been made, and that in the winter of 1903-4 extensive surveys were made in connection with the project; that seventy-eight miles of canals had been laid out; the Laguna Dam located; levees provided for and the COST ESTIMATED. Appended to the report are one map and 3 plates, the map being almost a replica of the plat made part of the pamphlet, plaintiffs' "Exhibit 15" (Rec. 228). These preliminary surveys and locations cost the government of the U. S. $174,735.85:

9th Ann. Rep. R. S. p. 82.

(Something should have been accomplished for that much real money.)

(b) Upon the completion of the surveys did the Secretary have before him the "necessary Maps, Plans and Estimates of Cost?" The answer to that will be found in plaintiffs' "Exhibit 2" (Rec. 164 to 198). At page 165-6 Rec. will be found a list of twenty-six maps and drawings that were transmitted to the Secretary on April 8, 1904, with the Report of the Board of Consulting Engineers (Rec. 235). The same "Exhibit 2" will show estimates of cost for every concievable feature of the Yuma Project, at pages 168, 180-1-2 and 3 and 189,

Rec., is found quantitiy, etc., of lands to be irrigated, and from pages 187 to 198 we find the ENTIRE ESTIMATE reduplicated with slightly different figures. So there can be no doubt the Secretary had before him the NECESSARY maps, plans and "estimates of cost."

(c) The next inquiry is did the Secretary DETERMINE whether or not the Yuma Project was practicable and advisable; and that, of course, cannot be denied by the defendants for they are his inferior officers and employes managing the Yuma Project under his directions, as the same has been managed for some sixteen years. But, however, we find in the

3rd Ann. Rep. R. S. 193,

that the Yuma Project was DETERMINED to be practicable and feasible upon the Report of the Board of Six Consulting Engineers, consisting of Mr. Davis et al., on May 10, 1904, as is also shown by our "Exhibit 4." (Rec. 201), also

6th Ann. Rep. R. S. 74, and all the other R. S. Reports to and inclusive of 16 Ann. Rep. U. S. 68.

3.

THE SECRETARY "ESTIMATED THE COST" OF THE PROJECT.

(a) The Secretary having, as we have shown, DETERMINED the practicability and advisability of the project, under Sec. 3 of the act, having had before him the "necessary Maps, Plans and ESTIMATES OF COST, he must necessarily have ESTIMATED and DETERMINED the COST OF THE CONSTRUCTION of the

project before he declared it to be FEASIBLE and PRACTICABLE. That follows, as a matter of course, under the law.

(b) But we have the FREQUENT and EXPRESS STATEMENTS of the Secretary of the Interior that he ESTIMATED THE COST. First in his letter of May 10, 1904, to the Director of the Geological Survey, plaintiff's "Exhibit 4" (Rec. 201), also incorporated in the pamphlet, plaintiffs' "Exhibit 15" (Rec. 226.), where he states:

> "It appears that under the Yuma Project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of LESS THAN $40 per acre."

And in 3rd Ann .Rep. R. S., 51,

> 'The Yuma Project, on the lower Colorado River, as now outlined, involves the reclamation of about 130,000 acres at a cost of $40.00 per acre, the land being on both sides of the river.'

And at pages 63-4,

> "It is ESTIMATED that water can be carried to about 87,000 acres of land by gravity canals * * * The ENTIRE COST of this enterprise, provided all of the valley lands are irrigated as contemplated, will amount to about $40 per acre irrigated."

The same statement appears at page 199 of the same report, and we have the matter definitely settled in:

4th Ann. Rep. R. S. 97,

in the following language:

(Division XXI, Subd. 3, Par. b.)

"YUMA PROJECT

"Detailed information concerning the general plans and irrigable lands of this project are given in the Third Annual Report of the Reclamation Service. THE ESTIMATED COST OF THE PROJECT as given in these reports, is $3,000,000, which sum was set aside by the Secretary of the Interior WHEN THE PROJECT WAS ADOPTED. The amount of valley lands which will be irrigated is ESTIMATED at ABOUT 90,000 acres."

It is true that in some of these statements the Secretary that we have just set forth the ESTIMATE is qualified by the terms "LESS THAN" (see letter of May 10, 1904), and "ABOUT" (as in the estimate in the 3rd Ann. Rep.). But we contend that that is precisely what "Estimated Cost" means, as heretofore set forth in numerous authorities cited in support of the 19th ground of the First Specification of Error, at pp. 94-97, supra, among others, the following:

" 'ESTIMATE' has no more certainty than the word 'ABOUT,' or 'MORE OR LESS.' "

Bautovitch vs. Lumber Company, 56 So. 1026, supra.

But surely $75 per acre, as compared to "LESS THAN $40 per acre, or $35 per acre," as set forth in the pamphlet, plaintiffs' "Exhibit 15" (Rec. 225), is not "ABOUT," or "MORE OR LESS," or "RANGING NEAR." And we say with the Congressional Committee, headed by Elihu Root, that:

"A SMALL DISCREPANCY MAY BE AND IS IN THE NATURE OF THE CASE UNAVOIDA-

BLE, BUT SUCH WIDE DIFFERENCES AS APPEAR IN THE INSTANCE CITED SEEM UNJUSTIFIABLE."

4.

SECRETARY POWERLESS TO ESTIMATE COST IN 1917.

We deem it unnecessary to enter into a lengthy discussion as to the meaning of the phrase "functus officio," or to attempt to dissect the numerous cases wherein that phrase is used, other than to say that it means literally "having discharged his duty;" and as applied to the Secretary of the Interior in this case, it means that in the year 1904 he had performed his duty in ESTIMATING THE COST and DETERMINING the feasibility and practibiity of the Yuma Project, and that, therefore, his authority became exhausted and at an end.

20 Cyc. 858—Note 12,

and the numerous State and Federal authorities there cited. It is particularly unnecessary to enter into such a discussion in this case for the reason that Sec. 4 provides that the charges per acre shall be DETERMINED with a view of returning to the Reclamation Fund the ESTIMATED COST of the construction of the project. That DETERMINATION, as we have shown, was made in 1904, and was repeatedly stated by the Secretary in the most formal and official manner. For, incidentally, if we are to take his letter of May 10, 1904 (Rec. 201), to the Director of the Geological Survey, and made a part of, and extensively circulated with, plaintiffs' "Exhibit 15" (Rec. 226), as meaning nothing, and having

no binding effect upon anyone, and gotten up as a "come-on" to induce certain gullible landowners to mortgage their lands to secure whatever cost the Secretary might thereafter arbitrarily fix as the cost of the project (and that, we contend, is really the attitude assumed by the defendants in this case), we cannot treat his declarations in the Annual Reports to Congress, above quoted, in any such way as that! for those reports are required to be made annually to Congress by Sec. 2 of the act, and he was thereby required to give ESTIMATES OF COST OF ALL CONTEMPLATED WORKS, etc.; and therefore, we contend, those expressions as to the ESTIMATED COST OF THE PROJECT are CONCLUSIVE UPON THE DEFENDANTS in this case. Surgart vs. Baker, 229 U. S. 187, Read p. 198. The appellees contended below, and will no doubt contend here, sustained as they are by the holding of the two Lower Courts, that until the Secretary chose to issue a public notice under the provisions of Sec. 4 he was not required to DETERMINE the ESTIMATED COST OF THE PROJECT, and that he could delay the issuance of that public notice for fifty years if he felt so inclined, and that when issued he could INCLUDE, in the charges per acre set forth in such public notice, all the COSTS THAT HE SAW FIT that had actually accrued up to the time of the issuance of the notice, HOWEVER DELAYED THE NOTICE MIGHT BE. But of that more anon. But we contend, that WHENEVER, or HOWEVER, the public notice should be issue, that it SHOULD and COULD IN LAW, contain

(Division XXII, Subd. 1, Par. a.)

ONLY a charge per acre EQUAL TO, or NOT GREATER THAN, the ESTIMATED COST as DETERMINED AT, or BEFORE, the time of DETERMINING the practicability and advisability of the project—in this case on May 10, 1904.

XXII.

THE PUBLIC NOTICE.

In support of our 22nd Ground of the First Specification attacking the finding of the Trial Court (Rec. 560) to the effect that the Public Notice was not given in May, 1904, but on April 6, 1917, we urge the following three propositions: (1) That a Public Notice was not necessary to fix and determine the "Estimated Cost" of the project; (2) That if a Public Notice were necessary one was actually given within the letter and the spirit of the law; (3) That if it were not actually given it must in this case be deemed, in contemplation of equity, to have been given; on which we offer the following:

1.

A PUBLIC NOTICE NOT NECESSARY TO FIX THE "ESTIMATED COST."

a. During the trial of this case and the discussion thereof leading up to the final decision below, the defendants urged and reurged, iterated and reiterated, the PUBLIC NOTICE! the PUBLIC NOTICE!! THE PUBLIC NOTICE!!! that nothing at all, practically, could be done unless some written document dubbed by somebody a "Public Notice" was actually issued by somebody and published in a newspaper somewhere under that particular name; and, as appears from the expres-

sion of the Court during the trial and in the opinion handed down, that cry had its effect upon, and that theory was adopted by the Trial Court (Rec. 313), and the Circuit Court of Appeals. The defendants urged, and the Lower Courts must have adopted, the view that without a "Public Notice" there could be no "Estimated Cost." Again we urge that that is a stupendous fallacy; that within the meaning of the law and in the nature of things the DETERMINATION of the ESTIMATED COST must have occurred BEFORE the issuance of any Public Notice, and that when the Public Notice should be issued, whenever that might be, that it must MAKE PUBLIC the ESTIMATED COST as originally FIXED and Determined. As a matter of fact the estimated cost is determined by the engineers who make the surveys and, in this case, were actually made by the engineers, as appears from our "Exhibit 2" (Rec. 164 and 198); and immediately upon the DETERMINATION of the FEASIBILITY of the project by the Secretary, of course, those ESTIMATES immediately have life and legal force. We now point out other official declarations as to when the project was determined to be feasible and practicabile:

> "The construction of the Yuma Project was authorized May 10, 1904."
>
> 6th Ann. Rep. R. S. 74,

and the same declaration is made repeatedly thereafter in the 7th, 8th, 9th and 10th, et esq., clear down to the 16th Ann. Rep. at page 68, made to Congress on December 4, 1916, four months before the issuance of the public Notice here in question; and after millions of dollars

had been expended by the defendants and their predecessors in office upon the Yuma Project. We take this position that, sometime prior to May 10, 1904, the Secretary of the Interior MUST under the law, have had before him, and, as a matter of absolute fact, did have before him, the estimates of cost for the Yuma Project; otherwise he could not and should not have determined the project practicable and advisable, and that therefore, as a matter of fact and law, when he authorized the construction of the project on May 10, 1904, he must have then estimated and actually did estimate, the cost; otherwise he and his subordinates, among others, the defendants, for the period of twelve years, had been UNLAWFULLY EXPENDING THE PUBLIC'S MONEY.

b. The making of the estimate of cost, and the determination of the charges per acre, of a reclamation project no more depend upon a notice, or the publication thereof, than the taking effect of an Act of Congress depends upon its being published in some book or newspaper. It may be so published, and when published it is more convenient to find, read, and understand; but it goes into effect, usually, on being approved by the President. There is nothing in the Reclamation Act that even by implication requires the estimates of cost or determination of charges to be made by or through a public notice of any kind. Section 3 provides that the Secretary shall determine if projects are practicable, etc., and that is a much more momentous function than determining the cost per acre; and yet it is fair to assume that no one will be so misguided as to urge that

the Secretary is required to make this determination through the instrumentality of a public notice. Sec. 4 requires the Secretary to DETERMINE the charges per acre with a view, etc., but there is no intimation as to when or how he shall make that determination, nor is there anything in law, reason, common sense or precedent requiring him to do it with or by a public notice, published or otherwise, any more than there is to require this court to publish its decision in this case, when rendered, in a newspaper. The determination of the charges per acre is one thing, and making known the result of that determination to the interested person is another. However that may be, one thing is absolutely certain, and that is: when the charges per acre are finally fixed, and public notice is given thereof, soon or late, prompt or slow, those charges MUST BE DETERMINED with a view of returning the estimated cost, etc., and any charges that may be fixed, and any published notice of them, whenever given, that does not conform to that law is absolutely void to the extent that they exceed the estimated cost of construction. Knowing in this case the estimated cost, we know what the charges should be.

2.

PUBLIC NOTICE ACTUALLY GIVEN IN 1904

a. Should it be determined that a Public Notice was necessary in order to fix and determine the estimated cost of the Yuma Project, we contend that such a notice was ACTUALLY GIVEN; and that it was given in a much more effective form, so far as actually notifying those who were interested, than the so-called Public

(Division XXII, Subd. 2, Par. b.)

Notice of April 6, 1917.

b. The fact to be considered in connection with the giving, of a Public Notice in 1904 is, as shown by plaintiffs' "Exhibit 5 to 13" inclusive, certain township plats certified by the Register of the U. S. Land Office at Phoenix, Arizona, where the land here involved is subject to entry, showing the status of those lands as being in public or private ownership on May 10, 1904. Those plats are not incorporated in the Record, by stipulation of the parties, for the reason that they would encumber it too much and for the further reason that the facts therein set forth are not the subject of dispute between the parties hereto. We believe that it will be admitted by the appellees that those plats show conclusively that on May 10, 1904, all of the irrigable lands within the Yuma Project and here involved, except about 6,000 acres, were in private ownership, either by the land having been patented or being subject to homestead or desert land entries made prior to the withdrawal of those lands under the Reclamation Act on July 12, 1902. Of those 6,000 acres practically all were located adjacent to the Gila River in Town. 8 So. Range 22 W., see Plat Rec. 228. There were no public lands in Town. 8 So. 23 W. and none in any part of the land designated as Tract "C" on the Plat, p. 9, supra, except about one hundred acres in T. 9 S. R. 24 W., and less than two sections in T. 10 S. R. 25 W. (These 6,000 acres should be distinguished from the 6,000 acres which are the subject matter of the 7th and 16th Grounds of the First Specification of Error, which only include about 1,000 acres of the 6,000 now discussed.)

Or, we may dispense with the plats, plaintiffs' "Exhibits 5 to 13" inclusive, and consult the table at:

5th Ann. Rep. R. S. 103,

and find therefrom that there was within the Yuma Project in 1904 at the commencement of the negotiations with the government, 76,000 acres of land, of which 55,242 was in the Yuma Valley, Tract "C," and 20,758 acres in the Gila River Valley, Tracts "A" and "B," of which 68,780 acres was in private ownership and, 7,220 acres were public lands, of which 1,230 acres was non-irrigable.

c. We should keep in mind that more than 92 per cent of the irrigable land in Tracts "A," "B" and "C" (Plat, p. 9 supra) were in private ownership in May, 1904, and should further keep in mind what the Secretary of the Interior, through his authorized agents, was seeking to achieve, that is, to secure a lien upon the lands in private ownership to secure the payment of the ESTIMATED COST of the project (no such security being necessary upon lands entered subject to the provisions, charges, etc., of the Reclamation Act (Sec. 3), and that such lien was to be secured through the instrumentality of the stock subscriptions, plaintiffs' Exhibits 14 (Rec. 209) and 27 (Rec. 274), into which was written, by reference, the Articles of Incorporation of the Water Users' Association, plaintiffs' "Exhibit 1" (Rec. 142 to 162), whereby:

> "The property of the Water Users is, in effect, mortgaged to secure the repayment of the ESTIMATED COST OF CONSTRUCTION."
>
> 3rd Ann. Rep. R. S., 55.

(Division XXII, Subd. 2, Par. d.)

d. A plan is outlined in a general way in:

3rd Ann. Rep. R. S., 54-5,

wherein it appears that two Arizona men, B. A. Fowler and Judge Joseph H. Kibbey, together with George H. Maxwell, were the founders of the Salt River Valley, Arizona, Water Users' Association, the first, and the model, for all other Water Users' Associations. Sometime after the organization of the Salt River Association, and prior to May 28, 1904, there was issued out of the Government Phinting Office, under the auspices of the U. S. Geological Survey, and the Reclamation Service thereof, a pamphlet referred to in the Record, page 207, as plaintiffs' "Exhibit 54," designated "Organization of WATER USERS' ASSOCIATIONS" in which is set forth in appendices, sample form of the Articles of Incorporation, to be adopted by other associations, following the Salt River plan, and a suggested form of contract, also following Salt River plan, to be entered into between the associations and the Secretary of the Interior, which is substantially the contract that is in controversy here; and from the body of the pamphlet we select the following paragraphs:

"1. The organization of a water users' association under each project should be undertaken as soon as the engineering examinations and surveys have proceeded to the point where the feasibility of the project from a physical standpoint is assured. The preliminary steps should be taken by a committee of people who are prominent in the vicinity and who have the confidence of those residing under the proposed project. It is advisable that such committee be appointed by a general mass meeting of those interested in the development of the project.

(Division XXII, Subd. 2, Par. d.)

"3. It is important that all the provisions relating to the adjustment of water rights, the regulation and distribution of water, the appurtenance of the water to he land, and the lien for the CHARGES ON ACCOUNT OF CONSTRUCTION SHOULD BE LEFT WITHOUT CHANGE.

"8. During this formative stage full publicity should be given to the various important features decided upon and also to the general form of articles of incorporation and by-laws promulgated by this office, inasmuch as deviations from this will be only in matters of detail and such as will not form the subject of serious controversy.

"9. By the time the articles and by-laws have been put in final form, the people generally will have been educated to a thorough understanding of the conditions by the local press and ALSO BY MASS MEETINGS HELD FROM TIME TO TIME FOR GENERAL DISCUSSION. The committee can then file the articles of incorporation with the appropriate State officer.

"10. After the articles have been filed, ONE OR MORE MASS MEETINGS should be called AS MAY BE NECESSARY, to BRING TOGETHER ALL THE PEOPLE INTERESTED. At these meetings the articles and by-laws should be fully discussed and subscriptions to the stock obtained from those present. Before construction can be undertaken it is necessary to obtain a sufficient number of subscriptions for lands in private ownership to assure the financial success of the project. Subscription blanks (see Article I of by-laws, Appendix A) should be printed and ready for use at such meetings.

"17. The matter of recording the subscriptions to stock is also one of considerable importance, because if not recorded the transfer of any tract for which a subscription has been made will not carry with it the

conditions of the subscription, and it would become necessary to obtain a new subscription from the purchaser."

The printing and circulation of the pamphlet such as our "Exhibit 15" (R. 213-228), did not seem to be contemplated by Mr. Wolcott, the Director of the U. S. Geological Survey, when he prepared and issue the foregoing pamphlet; and so far as we are advised, or gather from the Reclamation Service Reports, and the evidence in the Payette-Boise case and from what we know about the Salt River Project, the Yuma Project was the ONLY one in which the pamphlet plan was used; and the ONLY one in which it appears that the Secretary of the Interior made a definite estimate of the cost over his own individual signature, as is shown by plaintiffs' "Exhibit 4" (R. 201); and made a part of the pamphlet (R. 226).

e. That mass meetings were held, following the directions of the Director of the U. S. Geological Survey, appears, undisputed, from the testimony of OSCAR P. BONDESSON (Rec. 238), where it appears that there was practically a mass meeting in consultation with the Board of Consulting Engineers at Yuma, Arizona, on April 8, 1904 (R. 239-40), also that there was a mass meeting at Tule Laguna, on May 2, 1904, at which there was present practically all of the landowners, it having been "well advertised, and it was a living issue at that time as to which way we should go;" and at (pp. 263-4-5 Rec.), where it appears that the important mass meeting of May 28, 1904, was held in the evening of Elks Hall, on Main street, in Yuma,

which "had been called because it was very important —we were about to decide whether or not we wanted government irrigation and on what terms we could get it" (Rec. 264). "The landowners were in Yuma for the reason there had been a mass meeting called for that evening as it had been advertised extensively over the entire projct" (Rec. 263): And by the testimony of Fred L. Ingraham (R. 324), that he was present at the public meeting of April 8, 1904, before the Board of Consulting Engineers, and at the mass meeting called for May 28, 1904, "to advertise which there were handbills circulated and the usual means of advertising meetings of that kind from information of mouth to ear, which, in my judgment, and as events proved, was very effective; practically every family in the valley—every land holder was represented by somebody of mature age capable of considering the facts presented" (Rec. 325) "The meeting was held at Elks' Hall, Yuma, Arizona, on the evening of May 28, 1904. I was present. As I said practically every family that was interested in a tract of land in the Yuma Valley was represented by some person capable of considering the matter submitted at that meeting (R. 327). It was considered a very important meeting. It also included the owners of the land in the Gila Valley." And to the same effect is the testimonies of Lyon (R 336), Cloyd (R. 343) and Greer (R. 352). And the same testimonies at pages 238-9; 265-6-7-8; 324, 328-9-30-31-32; 339-40-41-42; 345-6-7; and 353-4, of the Record show that practically all the things required to be in a Public Notice, except the limit of area per entry, were fully discussed.

(Division XXII, Subd. 2, Par. f.)

f. We should next consider the pamphlet, plaintiffs' "Exhibit 15" (R 213-228), and its contents. Among many other things it contains (R. 214) an earnest request by the Water Users that the people be furnished a statement "of the character and cost of the proposed irrigation works." Also an estimate (R. 217-218) that there would be on the California side of the Colorado River 16,000 acres, and on the Arizona side 91,000 acres, and on both sides of the river there would be a total of 86,700 acres of irrigable land, of which 73,000 acres are in Arizona, which is further exemplified by the plat at page 228 Record; that there is an estimate (Rec. 224) that the entire cost of the project will amount to about $35 per acre; and (R. 225) that the Secretary has set aside $3,000,000 from the Reclamation Fund for the construction of the project; and (Rec. 225) a statement that the price will range near $35 per acre, to be paid for in ten annual installments after the first delivery of water, and finally the statement over the Secretary's own signature, under date of May 10, 1904, that the project, covering 85,000 acres of land could be reclaimed at a cost of less than $40 per acre, and setting aside the sum of $3,000,000 from the Reclamation fund for the construction of the Yuma Project (Rec. 226-7). The pamphlet itself, as will be seen therefrom, contains all the things required for the Public Notice by Sec. 4 of the Reclamation Act, except the limit of area per entry; that is, Sec. 4 requires that the Public Notice should contain five things, and this pamphlet contains four thereof, to-wit: (1) The lands irrigable under the project; (2) the charges per acre; (3) the number

of annual installments and (4) the time when they should commence. At this point we should consider that there was everything in the notice in which 92 per cent of all the land owners were interested, and that is, the private landowners were not concerned in the limit of area per entry.

g. The use made of the pamphlet, plaintiffs' "Exhibit 15," as a medium of conveying notice to the landowners and settlers within the Yuma Project was much more effective, we contend, than any mere publication of a Public Notice in a newspaper. At the request of the Supervising Engineer (R. 255), owing to a delay incident to having the printing done in the Government Printing Office, at Washington, D. C., this pamphlet was printed by the Water Users' Assocation in Los Angeles, California, to the extent of a thousand copies (R. 307 and 312); and as appears from the testimony of Bondesson (R. 263), and secured from the express office about noon, May 28, 1904, for the purpose of distributing it to the landowners generally, who were practically all in town that day, and "I was requested and directed by Mr. Newell, or Mr. Lippincott, to distribute it to the landowners, Rec. 264:—We had advertised in the papers the fact that they (the Reclamation Engineers) were coming, and distributed handbills to that effect, with the result that practically EVERY LANDOWNER IN THE ENTIRE DISTRICT WAS IN TOWN ON THAT DAY," and it was to these landowners that I distributed numbers of these pamphlets, and in which I was assisted by my partner, and practically every officer of the Association "* * * I personally knew all of the

landowners and I handed this pamphlet to the landowners. Rec. 265:—It was distributed or handed to those people who came to the meeting late who had not received a copy of it during the day. The landowners were practically all there at the meeting. It was the largest hall in town—all public meetings of that character were then held in that hall. Rec. 269:—Subsequent to the meeting the pamphlet was used for the purpose of convincing anyone who came to sign as a basis of negotiation, and if anyone wrote concerning the project they would mail them this pamphlet; a number of people were slow to sign and we had to send committees to their homes, and those committees invariably carried several copies of the pamphlet with them to be used for the purpose of study, so that they might know how intelligently to proceed about signing up. Later it was reprinted, and it was used by the real estate agents for advertising purposes. Rec. 270:—On the morning of the day that the pamphlet arrived the Supervising Engineer delivered to the Association a larger colored map, which is an enlargement of the map (Rec. 228.), that was made part of the pamphlet, and that larger map is in evidence as plaintiffs' "Exhibit 26" (not incorporated in the Record because of its size, but transmitted to this Court for examination by stipulation of the parties (Rec. 625). This map was used in connection with the pamphlet for the same purposes, as far as it went (Rec. 271). Later (Rec. 279) the map and the pamphlet were used for the purpose of inducing new settlers to purchase land within the project. To the same effect is the testimony of Judge Ingraham (Rec.

325) that the pamphlet was delivered to practically every land holder in the valley on the day of the meeting (May 28, 1904), and the distribution was continued after that meeting for a considerable time (Rec. 326), and was used in securing signatures and to explain to persons who might desire to purchase lands in the Yuma Valley the relations existing between the government and the Water Users' Association (Rec. 327). It was distributed to the landowners attending the mass meeting on the evening of May 28, 1904. To the same effect is the testimony of LYON (Rec. 339), and GREER (Rec. 352); and by means of the pamphlet DONOVAN (Rec. 349) was induced to purchase land within the Yuma Project; and in turn induced many others to purchase land in the same project. All that testimony is absolutely uncontradicted, as well as the following from BONDESSON (Rec. 307): "The pamphlet was distributed at the suggestion of Mr. Lippincott (the Supervising Engineer), and he had it printed for that purpose, the Association paying for it on his suggestion." There was no explicit mention of this pamphlet as a Public Notice under Sec. 4 of the Reclamation Act, but WE CERTAINLY TOOK IT TO BE THAT. And so the good work went on "until 98 per cent of the private landowners had signed up, and until about 98 per cent, all told, of the lands within the project were subject to the water charges;" (Bondesson—Rec. 276); also

3rd Ann. Rep. R. S. 198.

h. And in addition to all that the contract of May 31, 1906, annexed to plaintiffs' complaint, as "Exhibit

C" (Rec. 41), was submitted to the voters of the Association some time before its execution, and subsequent to May, 1904 (Rec. 317-18). It must be remembered that the homesteaders were constituent members of the Association, and had votes upon the question of the approval of that contract, he same as private landowners. See

Articles of Incorporation—Rec. 146.

i. Thus it appears, without contradiction, that absolutely every landowner within the Yuma Project, had directly brought to his attention in the most solemn manner, with the greatest publicity, everything of which the Secretary was required to give Public Notice of by the provisions of Sec. 4, except as to one feature, the limit of area per entry. In other words 92 per cent of the landowners had public and solemn notice of everything that they were interested in; and the other 8 per cent had notice of four-fifths of the things that they were interested in. And we now ask for whose benefit and knowledge was this Public Notice required to be given? For the use and benefit of the Secretary of the Interior? No, for he was the depository of the information, and he needed no notice, as he was the fountain head of the knowledge; and had judicial notice of everything. A notice was required to be given for the use and benefit of the settler, as pointed out by Mr. Mondell in his speech on the 12th of June, 1902, page 103 supra; and by Judge Deitrich, in his decision on July 19, 1919:

Payette-Boise vs. Cole,
263 Fed. reading at 738,

so that prospective settlers may determine for themselves whether they will, or will not settle upon the lands, and thus bind themselves to pay the published price for water. Therefore the plaintiffs here might very well waive the issuance of a Public Notice; and we did waive it, if it was not issued and published during the year 1904 (as we contend it actually was, as heretofore shown), by signing up and mortgaging our lands to secure the estimated cost of the project.

j. It is to be noticed that Sec. 4 of the Act does not require a written notice to be printed and published in a newspaper; but simply provides that the Secretary shall GIVE public notice of the specified things. We insist that the Secretary in 1904 did GIVE Public Notice of all the things required by the Act, except one. The Secretary might very well, under Sec. 10 of the Reclamation Act, have prescribed rules for the time, manner and form of giving the Public Notice required by Sec. 4. But he neglected to do so preferring to await developments as shown by the following:

> "Rules and Regulations.—Section 10 gives general authority to the Secretary to perform necessary acts and make essential regulations, the regulations being promulgated from time to time, as occasion requires, in order that they may be adapted to conditions found in actual practice. The law leaves executive discretion a wide range, and it has not been considered desirable to attempt to anticipate the conditions which might arise, but rather to meet them as they come and to promulgate rules and regulations on the basis of experience."
>
> 3rd Ann. Rep. R. S. 32.

(Division XXII, Subd. 2, Par. k.)

There is an attempt at page 30 of the 4th Ann. Rep. R. S. to show that there is a rule prescribed in 33rd L. D. 191 for the giving of the Public Notice described by Sec. 4. But reference to that volume of the Land Decisions shows that there is no rule promulgated there, and nothing whatever but the Public Notice for the Truckee-Carson Project. It is not a general rule and could have no application to the other projects. Incidentally that was the first Public Notice issued under the Reclamation Act, and it was dated August 18, 1904, and no other Public Notice appears to have been issued until the year 1907.

k. If it should be urged that the figures as to the cost per acre in the pamphlet, plaintiffs' "Exhibit 15," and the Secretary's letter of May 10, 1904, plaintiffs' "Exhibit 4," are too indefinite to constitute a Public Notice as to the cost of the project, that is not plaintiffs' fault; and that, as heretofore pointed out, in no event, no matter what the Public Notice contains, are we required under the law to pay more than the estimated cost. Furthermore, the estimated cost upon which the Public Notice was issued for the Truckee-Carson Project;

33 L. D. 190,

was less definite and certain than the estimated cost of the Yuma Project, for on page 51 of the 3rd Ann. Rep. R. S., where the cost of the Yuma Project is definitely fixed at $40 per acre, the following appears concerning the Truckee-Carson Project:

"The Truckee Project, now under construction, will reclaim upward of 150,000 acres at a cost of

ABOUT $26 per acre."

And in 33 L. D. 159, the Secretary in his instructions to the Commissioner of the General Land Office to issue the notice used this language:

> "You will cause notice to be given that the.... charges which shall be made per acre upon entries of the said lands are ESTIMATED TO BE $26 per acre," etc.

l. If it should be objected that the pamphlet was not signed by the Secretary of the Interior, we urge, first, that at least a portion of it was, that is his letter of May 10, 1904, at the foot of the pamphlet (Rec. 226-7); and, second, that all of the annual reports of the Reclamation Service to Congress are signed by the Secretary of the Interior. But in the case of the Public Notice for the Truckee-Carson Project, it was not signed by the Secretary of the Interior, but by the Acting Commissioner of the General Land Office.

Our notice of 1904 was signed by the Chief Engineer, and as to his authority see par. d, subd. 3, Div. XXIII of this Argument, p. 172 infra. He was, practically, the Secretary.

m. And finally, according to the uncontradicted evidence, the pamphlet was actually treated as the Public Notice under Sec. 4 of the Reclamation Act, according to the uncontradicted testimony of our principal witness:

> "There were printed of the first issue of those pamphlets, one thousand. Then it was reprinted as many as two times by the Association, while I was president, and I don't know whether it has been reprinted since or not. I am inclined to think it has

not. It was the custom of either myself or the secretary to hand this pamphlet to various individuals that came and inquired about lands and I referred to it then in general terms as the public notice under section 4 of the Reclamation Act. I told them in effect that it was a public notice under Section 4 of the Reclamation Act. By that I mean that that was exactly what we had expected under that Section 4. That is what we had to go on, and that is what we would have to pay and that is what we relied on." (Rec. 310.)

Therefore we insist that, within the letter and the spirit of the law, a Public Notice was actually given in the year 1904, as required by Section 4 of the Reclamation Act.

3.

EQUITY WILL PRESUME PUBLIC NOTICE TO HAVE BEEN GIVEN IN 1904.

Should it be held that a Public Notice was necessary in order to fix and determine the charges per acre of the Yuma Project, and should it be further held that such Public Notice was not actually given as we have set forth in the preceding subdivision, we respectfully contend that equity will presume that such notice was actually given by the Secretary of the Interior in the year 1904, for

> "Equity regards that as done which ought to be done; and it looks to the intent rather than the form."
>
> Pomeroy's Eq. Jur. Sec. 363, 3rd Ed.

a. Section 4 provides that upon the determination by the Secretary that any irrigation project is practicable, he MAY let contracts, etc., and THEREUPON he shall

give public notice of the lands irrigable, etc.; also, of the charges which shall be made per acre upon the lands, etc., together with the number of installments, etc,. and that said charges shall be determined with a view of returning to the Reclamation Fund the ESTIMATED COST OF THE CONSTRUCTION OF THE PROJECT, etc. There can be no doubt that the Secretary did, on May 10, 1904, determine the Yuma Project to be practicable. The defendants having their own meaning for "estimated cost" and contending that "thereupon" means thirteen years afterwards, it may be well to consider the real meaning of the word "thereupon." There can be no doubt where it is used as an adverb of time as in Sec. 4, that it must mean at once, without delay, and in support of that view we cite the following authorities:

Webster's New International:

"3. Immediately after that; at once; without delay."

Also the following cases:

State vs. Van Wyke, 54 Pac. 768,
Kaufman vs. Drefel, 76 N. W. 559,
Mansur vs. Co. Commis. 22 Atl. 358,
State vs. DeLea, 93 Pac. 814.

Whether the Secretary might delay the giving of the Public Notice until after the letting of the contracts may be a debatable question. We are inclined to think that the statute means that he shall immediately upon the determination give the Public Notice. However, in this case he did let contracts for the building of the Laguna Dam on June 5, 1905,

4th Ann. Rep. R. S. 98-100,

and for twelve miles of dikes on August 17, 1905, Ibid., 100; and on the last named date it became the duty of the Secretary of the Interior to give the Public Notice. And to show the contemporaneous construction placed upon the Act by the Secretary, we quote the following from:

1st Ann. Rep. R. S. 64:

"As soon as possible after such withdrawal, engineers are instructed to make the survey of the lands and of the proposed canals and reservoirs; also to conduct necessary engineering investigations concerning the water supply and the conditions under which the construction will be carried on. Upon the completion of this work the results are to be summarized and submitted to the Secretary of the Interior, with such recommendations as may be deemed advisable by the Director of the Geological Survey, together with maps, plans, and estimates of cost.

"It will then be the duty of the Secretary of the Interior to determine whether or not such project is practicable and advisable. If determined to be impracticable or inadvisable, he will restore to the public domain the lands withdrawn, and they will become subject to the public land laws, as if such withdrawal had never been made. If the project is approved by the Secretary of the Interior, he may cause contracts to be let for the construction of the proposed works, either as a whole or for such portion or section as will constitute a complete system, if it should be deemed best not to undertake the entire project at that time. He will THEREUPON give public notice of the land which may be reclaimed thereunder, and of the particular limitations contemplated by the law as to area, cost, number of installments, date of payments, etc."

And again in 33rd L. D. 158, in the Secretary's instructions to the Commissioner of the General Land Office to issue the Public Notice for the Truckee-Carson Projec, we find the following:

> "A CONTRACT HAVING BEEN ENTERED INTO for the construction of the irrigation works known as the Truckee-Carson Project in Nevada, IT BECOMES THE DUTY of the Secretary of the Interior under Section 4 of the Act of June 17, 1902 (32 Stat. 388), to give public notice, etc."

Therefore we find that from the plain terms of the statute, and the "natural, plain, obvious and ordinary signication" of the word "thereupon" and the contemporaneous construction of Sec. 4 by the Secretary, whose duty it was to enforce it, that, at the very latest in August, 1905, it became the duty of the Secretary to issue the Public Notice for the Yuma Project required by Sec. 4. It does not affirmatively appear from the evidence in this case that he did not so perform his duty. Therefore we say:

> "It is a presumption of law, until the contrary appears, that officers have done their duty."
>
> 29 Cyc. 1437,
> 1 L. D. 223;
> State of Louisiana, 5 L. D. 514.

b. There is another principle of law and equity peculiarly applicable to the Secretary of the Interior; and very frequently referred to and acted upon by that officer in his administration of the public land laws; that is, "where an individual in the prosecution of a right does everything which the law requires him to do, and fails to attain his right by the misconduct or NEGLECT

of a public officer, the law will protect him, and his rights will not be impaired because of the officer's negligence."

Pomeroy vs. Wright, 2 L. D. 166, and other cases cited in
3 L. D. 42; 4 L. D. 466 and 515,
5 L. D. 233 and 646; 6 L. D. 147,
20 L. D. 535, and numerous others.

Most of these cases deal with neglect of the local officers, but that does not detract from the principle, which is enunciated by the highest authority.

Lytle vs. Arkansas, 9 How. 314.
Railroad Co. vs. Smith, 9 Wall. 95.
Van Wyck vs. Kneval, 106 U. S. 367.

The doctrine laid down in Lytle vs. Arkansas, supra, has been approved so many, many times by this Court. and other Courts of last resort, that space and time forbids their citation.

See 4 Rose's Notes, 203, Rev. Ed.

If it can be conceived, or if it be seriously contended, that a public notice was necessary in 1904 to fix and determine the estimated cost of construction of the Yuma Project and the charges which should be made per acre therefore; and when it is considered what was actually done in the way of bringing notice home to those interested; and when it is considered that we did everything that we were reqnired, or asked, to do, by "mortgaging our lands to secure the repayment of the estimated cost of construction;" and when it is further considered that it does NOT affirmatively appear that Public Notice was NOT given; must it not, we ask, be

conclusively presumed that the Secretary of the Interior did his duty in the years 1904 and 1905; and that he is estopped in 1917 to deprive us of our vested rights to have the project constructed for the estimated cost, by a new and improvident public notice; and should not the Secretary be estopped directly, or through his employes, to assert that for 13 years he had been, in effect, unlawfully expending public moneys?

c. And there is yet another principle that may be invoked. No one can take advantage of his own wrong or neglect. It was the duty of the Secretary to give the Public Notice, required by Sec. 4, for the Yuma Project, not later than August, 1905. If he had done so, and he had fixed the charges per acre at any sum less than $40 per acre; and if he had then issued the Public Notice he must have, and would have, fixed the charges at the amount of the estimated cost (as he did in the case of the Truckee-Carson Project, See 3rd Ann. Rep. 51; and 33 L. D. 158), some sum less than $40 per acre. If he had then so fixed the charges per acre they would have been binding and conclusive upon everyone. (We challenge plausible dissent from proposition.) The Secretary neglected to perform his plain duty for 12 years; and can he now, because of so neglecting his duty, levy a charge upon our lands of twice the amount he could have levied upon them in 1905? We respectfully urge that the answer must be, NO.

(Division XXIII, Subd. 1, Par. a.)

XXIII.

PLAINTIFFS DID NOT WAIVE THEIR LEGAL AND EQUITABLE RIGHTS BY THE CONTRACT OF MAY 31, 1906.

In our 23rd ground of the First Specification of Error we attack the holding of the Trial Court (Rec. 560-2), to the effect that the terms of the contract entered into between the Secretary and the corporate plaintiff on May 31, 1906, plaintiffs' "Exhibit C" (Rec. 41-8), are clear and understandable and must be held to express the intention of the parties, and to be binding upon the plaintiffs to the extent of $75.00 per acre. That is, if we understand the holding of the Lower Courts and the contention of the defendants, the plaintiffs entered into a contract that compels us to pay any sum whatsoever that the Secretary might at any time choose to set forth in a Public Notice as the charges against the land, no matter what Congress really intended, and no matter how it expressed itself; and even though we may be right as to our contention as to the meaning of the words "estimated cost" and "thereupon," that we are estopped by our own contract to say that we shall not return into the Reclamation Fund such an amount of money as the Secretary may choose to apportion to our lands. In opposition to that we offer the following.

1.

THE SECRETARY SHALL APPORTION ONLY THE "ESTIMATED COST."

(a) For the convenience of the Court we here set forth the immediately important portion of Sec. 5 of the

contract in question as the same appears at p. 45 of the Record:

"5. The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders, and promptly pay," etc."

b. We believe it to be worthy of note that that provision of the contract of May 31, 1906, and in fact the whole contract, is almost a duplicate of the sample form of contract set forth in the pamphlet on "Organization of Water Users' Associations" issued by the Director of the U. S. Geological Survey sometime prior to May, 1904, in Appendix B, pp. 26 to 28 thereof, as will be seen from the following portions of Secs. 4 and 5 taken from said Appendix:

"4. That the payments for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten equal annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

"That the said Water Users' Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and

will promptly levy calls or assessments therefor and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay, etc."

See also Salt River contract, Sec. 4 and 5 thereof, 3rd Ann. Rep. R. S., 131.

It was contemplated that that contract should have been entered into before any work was begun, as appears from Par. 24 of that pamphlet:

"After the subscription books of the association have been closed, preparations must be made for the execution of the contract between the Water Users' Association and the Secretary of the Interior. The form of this contract is printed as Appendix B, and can be adapted to any project with very few changes. This contract must be entered into before construction will be begun."

Which we believe is significant, and bears out Mr. Bondesson's testimony (Rec. 317) to the effect that the contract was prepared in 1904 in the form in which it was finally executed, but there had been delay, etc.; and also in accordance with the admonition of Par. 26 of the same pamphlet, which states:

"No changes should be made, as they might involve the refusal on the part of the Secretary to execute the same," etc.

All of which we deem important in considering this contract.

c. The vital portion of the contract, here to be considered, is that portion of Par. 5 thereof whereby the corporate plaintiff

"agrees that it will promptly collect, etc., and hereby guarantees the payment for that PART of the cost of the irrigation works which shall be apportioned by

the Secretary of the Interior to its shareholders."

It was contended below, and the Trial Court has found that that language is unambiguous and conclusive; and that, in effect, it means that we are bound to pay the $75 per acre, or any other charge that the Secretary of the Interior might have chosen to levy upon our lands. If it should be the law that the Secretary may levy any arbitrary amount, then we presume the language is unambiguous and conclusive. But first let us see if it is unambiguous on its face. The plaintiff corporation is to collect, etc., "that part of the cost * * * apportioned by the Secretary." What PART? We look in vain to other portions of the written instrument for an express, or implied, declaration as to what PART of the cost is to be collected and guaranteed. It will hardly do to say that it is just such portion of the cost as the Secretary of the Interior should arbitrarily and of his own sweet will determine should be paid back. Not at all, for if the government ox should be gored by some misguided, corrupt, or over sympathetic Secretary of the Interior determining that the Yuma Project should return only $1.00 per acre, when the actual cost might be $100.00 per acre, there would be loud, prolonged and successful protest against that sort of inequitable nonsense. The Public Notice containing a charge of a dollar per acre would not last long. That is self-evident. Or, to go to the other extreme, assuming that the entire Yuma Project as now outlined by the Secretary, including the Bard, California, Unit, the Lower Colorado Irrigation District (see Sec. 3, Article IV, Articles of Incorporation, Rec. 145, and Art. IV of the Amendments thereto, Rec. 161, Pltffs' Ex. 1), the only portion of the

project involved in this suit, and the 40,000 acre Mesa Unit, were completed at a cost of $20,000,000, and the Secretary should have chosen to apportion it all to the Lower Colorado District, would such an apportionment stand? We think not, because the charges would not be "apportioned equitably" in accordance with Sec. 4 of the Reclamation Act. But, according to appellees, we must not look to the law for help in construing the contract; for, of course, if we go to reading in "apportioned equitably" it is inevitable that some Water Users who "mortgaged his land" eighteen years ago to secure the repayment of the "ESTIMATED COST OF CONSTRUCTION," will insist on having that phrase read into the contract also!

d. But we need not "read" it in; it is there already. The contract (Rec. 42) recites that the United States contemplates the construction of certain irrigation works under he provisions of the Reclamation Act, etc., approved June 17, 1902, and in paragraph 10 of the contract (Rec. 46) appears the following:

> "It is understood that in ALL the relations between the government and this Association and the members of the Association, the rights of the members of the Association are to be DEFINED, DETERMINED and ENJOYED by and under said Act of Congress."

Still leaving ourselves open to the imputation of unwarrantably assuming that this Court knows no law, we quote the following from Elliott on Contracts, Sec. 1514:

> "Effect must be given to all the provisions and parts of the contract where possible, and no part should be rejected unless absolutely repugnant to the

general intent. A single word or sentence should not be considered alone but should be considered with reference to the context."

Citing:

Amer. Bond vs. Pueblo Inv. Co., 80 C. C. A. 97,

and numerous other Federal and State authorities.

We take it that one of the RIGHTS to be enjoyed by the plaintiffs in this case is to have, in accordance with Sec. 4 of the Reclamation Act, the charges per acre "determined with a view of returning to the Reclamation Fund the ESTIMATED COST of construction of the project," apportioned equitably. Therefore we respectfully contend that this case begins and ends with the contract itself, and that the PART OF THE COST which shall be apportioned by the Secretary of the Interior to the plaintiffs is the ESTIMATED COST of construction of the project, as provided by Sec. 4. And we submit, that almost the same point has been judicially determined in:

U. S. vs. Cantrall, 176 Fed. 949.

In that case, concerning the Klamath project, the United States sued Cantrall et al., water users, for certain unpaid O. and M. charges, under a written contract providing, among other things, that they would pay to the U. S. "the charges duly levied against such lands for the management and operation of the irrigation system." Judge Bean, of the U. S. District Court of Oregon, deciding the case, expressed himself as follows, reading at page 954:

"It does not follow, however, that the maintenance charges fixed by the Secretary of the Interior are conclusive as against the defendants. This action is

on an express contract entered into between them and the government. The liability and duty of both parties to the agreement are measured by the terms of the contract. By it the defendants agreed to pay to the United States the charges DULY levied against their lands for the purposes stated. This NECESSARILY means charges which the government is AUTHORIZED to COLLECT," etc.

In this case the government is authorized to collect only the ESTIMATED COST of the construction of the project, as determined by the Secretary of the Interior on May 10, 1904—less than $40 per acre, and no more.

2.

IF THE CONTRACT IS AMBIGUOUS OR DOUBTFUL, IT SHOULD BE CONSTRUED AS REQUIRING THE SECRETARY TO APPORTION THE ESTIMATED COST.

a. We insist that the contract is unambiguous from our standpoint, when read with Sec. 4 of the Reclamation Act, and that it requires the Secretary to apportion only the estimated cost; but if, on the other hand from the appellees' standpoint, it is apparently unambiguous it may be rendered ambiguous and open to construction if its language is doubtful so that it is susceptible of two constructions, one of which makes it a fair contract, such as prudent men would naturally execute, while the other makes it inequitable and such as reasonable men would not be likely to enter into; and that the interpretation which makes it a rational and probable agreement will be preferred to that which makes it an unfair or improbable contract:

Elliott on Contracts, Sec. 1510, citing:

(Division XXIII, Subd. 2, Par. b.)

Rope Co. vs. Min. etc. Co., 97 C. C. A. 465,
Pressed Steel Car Co. vs. Eastern R. Co., 57 C. C. A. 635,
Amer. Bond. Co. vs. Pueblo Invest. Co., 80 C. C. A. 97,
Coghlan vs. Stetson, 19 Fed. 727, and numerous State authorities.

b. Certainly the language of the contract, to the effect that the plaintiffs agree to pay such part of the cost as the Secretary should apportion, standing alone, is susceptible of two constructions, one of which would be that we agreed to pay any charge that the Secretary might choose to levy, and the other is that we only agreed to pay such part as Sec. 4 of the Reclamation Act provides that we shall pay—the estimated cost of the construction of the project. We contend that the contract, as construed by the Lower Courts, is not such a contract as reasonably prudent men would be likely to enter into, and not a rational and probable agreement, but on the contrary is unfair and improbable. As pointed out by the witness Fred L. Ingraham (who is himself a jurist—Rec. 321), speaking of the mortgage, or lien, executed by the Water Users upon their lands (plaintiffs' Exhibits 14 and 27, Rec. 209 and 274), at page 333 Rec., "If there were no estimated or limited cost which we agreed to pay, then the execution of this lien amounted on the part of the landowners to a gift of their pocketbooks, saying 'Take this and do as you will with it.' That is the way I viewed it at the time, and that is the way I ADVISED OTHER PEOPLE, and Judge Kibbey coincided with my views, and sent his

OPINION to the same effect to the Water Users' Association."

c. Mark that the uncontradicted evidence shows our attorneys advised us, in effect, that Sec. 4 was part of the contract, and that there was a limit to the amount that the Secretary could apportion to our lands—the estimated cost, only. But also mark that we are caught between two fires by the holding of the Trial Court (Rec. 561) in its opinion. "No claim can be made that they were ignorant, or unacquainted with business methods, or contractual relations. It must be assumed that they read the contract, and fully understood its every provision; and if not their own counsel was there to ADVISE them, etc." Yes, our COUNSEL were there to advise us, one of them being Judge Joseph H. Kibbey, second to none, perhaps superior to all, in his profound learning in irrigation law, and the very father, founder, and architect, of the whole vast plan and structure of Water Users' Associations, and this very contract:

2nd Ann. Rep. R. S. 31,

3rd Ann. Rep. R. S. 55, and

Pamphlet on Organization of W. Users' Ass'n.

And Judge Kibbey (who was practically selected for us as our counsel by the Supervising Engineer; see Pltffs' Ex.'s 20 and 22, Rec. 250 and 257), with all his learning and ability, the very fountain-head of knowledge in the matter, 16 years before the rendering of the appealed-from decision, and while yet the Secretary was officially promulgated to the world the wisdom and advantages of that provision of the law which requires the estimated cost, only, to be returned to the Reclamation

Fund (2nd Ann. Rep. 30, 3rd Ann. Rep. 31, 4th Ann. Rep. 22) advised us that the contract limits the amount that the Secretary can apportion to our lands to the estimated cost. And yet it is contended, and held, that it is clear, plain and positive that the contract means diametrically the opposite! And, we ask, how could Judge Kibbey possibly advise us other than that the Secretary was limited in the amount which he should assess against our lands to the estimated cost, as determined by him in May, 1904. The Judge had drafted a contract for our Water Users' Association, and all Water Users' associations, providing (Rec. 46-7) that in ALL the relations between the government and the Association, and the members of the Association, the rights of the members are to be defined, determined and enjoyed by and under the provisions of the Reclamation Act; which by its express terms provides that the charges shall be determined with a view of returning to the Reclamation Fund the estimated cost of construction.

d. The lien referred to by Judge Ingraham (Rec. 209) is really part of the contract here for construction. The Articles of Incorporation of the Association is made part of the contract (Rec. 41); and the same articles are made part of the lien with the same force and effect as though the articles were a part thereof (Rec. 209); so therefore there are really three separate instruments constituting the contract here to be considered. We do not deem it at all probable that any rational set of men would enter into an agreement giving to a single man on the other side of the pact the right to fix the price to be paid for the work to be done. Cer-

tainly no rational human being would, under the not-unlike circumstances, enter into a contract with, say a building and loan association, for the construction of a dwelling house upon his lot giving the building and loan association a lien to guarantee the payment of the cost, and then leave it to the mortgagee to determine how much it should collect from the house and lot when it got ready to make the apportionment. Any man, or set of men, that would enter into such a contract with a private corporation would be instantly dubbed insane by rational, thinking people, and yet it is seriously urged by the appellees in this case, in spite of the specific promises that were made to them by the engineers, and the glowing and confident statements in the Pamphlet (Rec. 225), that an effort had been made "to cover all contingencies, and the estimate of cost had been liberal," and that the price would "range near $35 per acre;" and the solemn and official statement of the Secretary (Rec. 226) that their lands could be reclaimed "at a cost of less than $40 per acre," and that "$3,000,000, or so much thereof as may be necessary," had been set aside for their reclamation, all in response to their request that they be furnished with a statement of the cost per acre to the land (Rec. 214 and 249), that the landowners and settlers within the Yuma Project in 1904 entered into just such an irrational and improbable contract as the supposed one with the building and loan association, and did, in effect, say to the Secretary, "Take our pocketbook, and do as you will with it, and we give you a mortgage on our homes to secure any amount you choose to charge.

(Division XXIII, Subd. 2, Par. f.)

e. We point out, if there should now be any doubt as to how the contract should be construed, that this is the government's contract, that the language is the government's language; and, as shown above (Par. b of the preceding subd. 1), that Sec. 5 of the contract is practically a duplicate of Par. 5 of the prepared form of contract for all projects, as shown in Appendix B of the pamphlet for the "Organization of Water Users' Associations (referred to in the Rec. 209 as plaintiffs "Exhibit 54"), and

> "That when there exists an uncertainty or ambiguity as to the meaning of the terms of an agreement and the language may be attributed to one of the parties thereto, it will be considered most strongly against the party using the language thereof * * * When a contract is entered into and generally used by one of the parties, and doubt arises as to the true meaning of such form, it shall be construed most strongly against the party preparing it."
>
> Elliott on Contracts, Sec. 1528—citing:
>
> Noonan vs. Bradley, 9 Wall. 394,
>
> Amer. Sur. Co. vs. Pauly, 170 U. S. 160;

Also see:

Bank vs. Hart, Ins. Co., 95 U. S. 673,

T. P. R. Co. vs. Reiss, 183 U. S. 621,

Garrison vs. U. S., 7 Wall. 688.

f. And if it should be urged that this is a contract made with the United States of America, and that it is dealing with the public's money, and is therefore not bound by the same rules of law as apply to insurance and railroad companies, the answer to that is, that this contract does not involve a grant of public land or a public franchise, but is an ordinary commercial con-

tract based upon an adequate consideration, and is not subject to the rules governing the grant by the government to private persons of property rights or franchises in which the whole public is interested. See

Garrison vs. U. S., 7 Wall. 688,
Langdon vs. New York, 93 N. Y. 129,
Dermott vs. State, 99 N. Y. 101; 1 N. E. 242.

In other words:

"The rules governing the construction and operation of contracts generally apply to contracts entered into by the United States and the United States, when they contract with their citizens, are conrolled by the same laws that govern their citizens in that behalf, and the obligations which would be implied against citizens under the same circumstances will be implied against them."

39 Cyc. 742—Notes 4, 5 and 6,

citing a multitude of decisions of this Court.

And in the construction of irrigation works under the Reclamation Act the United States is not exercising a government or a public function, but is promoting its proprietary interests:

Twin Falls Canal Co. vs. Foote, 192 Fed. 583,
Stanfield vs. Umatilla W. Users' 192 Fed. 596

3.

IN VIEW OF THE ACTIONS OF THE SECRETARY, AND THE AUTHORITY OF THE CHIEF ENGINEER, THE PAMPHLET, PLTFFS' EX. 15, SHOULD BE READ INTO THE CONTRACT.

a. No doubt an effort will be made to show that in all the oral proceedings, as they may be called, hereinafter set forth, the Secretary was entirely without

knowledge as to any of the happenings, or the contents of the Pamphlet Pltffs' Ex. 15 and that it was all without his authority, and that nothing that was said or done by any of his subordinates could bind him or the United States. That, we believe, to be another stupendous fallacy, for it will not do for the Secretary of the Interior to take that position, when he has repeatedly over his official signature in his reports to Congress, under Sec. 2 of the Act, recommended and, in fact, required, the landowners to proceed in the way that we proceeded in the floating of the Yuma Project:

2nd Ann. Rep. R. S. 31-32, 46-47,
3rd Ann. Rep. R. S. 54-55.

He pointed out the Salt River Project method of proceeding as a model for all other projects, recognized the existence and potency of mass meetings, and finally, through the Director of the Geological Survey, caused to be issued the pamphlet on the Organization of Water Users' Associations, plaintiffs' "Ex. 54" (Rec. 208), voluminous excerpts from which appear in Par. d, Subd. 2, of Division XXII, of this Argument p. 39 supra, wherein methods of floating projects are recommended and required, which we followed.

b. In the very pamphlet under discussion, plaintiffs' "Exhibit 15" (Rec. 213-28) it is shown at page 213 that we addressed our communication of May 3, 1904, to "E A. Hitchcock, Secretary of the Interior, Washington, D. C." as was the petition of the governors of the Water Users' (Pltffs "Ex. 19," Rec. 248); and while the response (Rec. 215) seems to have come from the U. S. Geological Survey, yet the language is so framed.

in the third person, that it might as well have been written by the Secretary, as by the Chief Engineer, whose name is appended to it (Rec. 227). In any event the pamphlet is the answer to our petitions, under date of May 16, 1904, we find:

> "Your communication of May 3, 1904, accompanied by the petition under the same date, etc., is hereby acknowledged." (Rec. 215).

Evidently, as we shall show in Par. d below, the Secretary of the Interior must have delivered our petition to his proper subordinate officer for answer; and if the answer cannot be construed as the personal answer of the Secretary himself, it certainly must be conclusively presumed that the answer was written under his direction and by his authority. Therefore the Secretary of the Interior cannot, nor can the appellees as his employes, pretend to have no knowledge of what happened in the oral proceedings at Yuma, Arizona, on May 28, 1904, or to have no knowledge of the contents of the Pamphlet, Pltffs' Ex. 15, and cannot escape responsibility for what was said and done there by his representatives.

c. We believe it is hopeless to search for apt authorities on this point; as the whole proceedings were wholly without precedent; but we respectfully urge that if a private corporation, such, say as the Colorado Delta Canal Company, which was offering us the alternative proposition (as shown by plaintiffs' "Exhibit 17 and 18," Rec. 243 and 5); should through its Directors and Chief Engineer have done as the Secretary of the Interior did in this matter, there could not be much ques-

tion but that the corporation would be bound by what was said and done.

"Authority to do a particular act or make a particular contract need not be necessarily expressed, but may be inferred from the facts and circumstances of the particular case, as from a course of conduct or dealing by the corporation with its officers and agents and the public."

14a C. J. Sec. 2226, Corporations, Notes 17 and 18, citing:

Mahoney Min. Co. vs. Bank, 104 U. S. 192,

Martin vs. Webb, 110 U. S. 7,

Augusta Bank vs. Earl, 13 Pet. 519,

Hailey Bank vs. Min. Co., 36 C. C. A. 633,

and numerous other Federal and State authorities.

And as the United States, in operating under the Reclamation Act, is proceeding in its proprietary, and its governmental, capacity,

Twin Falls Canal Co. vs. Foote, 192 Fed. 583,

Stanfield vs. Umatilla Water Users, 192 Fed. 596,

we believe that the Secretary should be bound by the oral proceedings at Yuma, Arizona, on May 28, 1904, and the contents of the Pamphlet, Pltffs' Ex. 15, just as a private corporation or individual would have been.

d. But we can safely go further: Sec. 10 of the Act provides:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make all such rules and regulations as may be necessary and proper for the purposes of carrying the provisions of this act into full force and effect."

In 1st Ann. Rep. R. S. 16, we find:

(Division XXIII, Subd. 3, Par. d.)

"The Reclamation Service, organized for the purpose of making surveys and examinations required by the law of June 17, 1902, and for putting into effect the various projects authorized by law, has been created by the Secretary of the Interior."
And in 2nd Ann. Rep. R. S. 41-42:

"The plans of operation under the reclamation law approved by the Secretary of the Interior on July 8, 1902, authorized the creation of what is known as the Reclamation Service, etc."

"The principal officer of the Reclamation Service is the Chief Engineer, etc."
And in

3rd Ann. Rep. R. S. 40-41,

under "Organization of the Reclamation Service," we find:

"The Chief Engineer and assistant chief engineer HAVE FULL CHARGE of ALL ENGINEERING and ADMINISTRATIVE MATTERS * * * the Chief Engineer giving particular attention to DEPARTMENTAL and related matters, etc."
And we find in

4th Ann. Rep. R. S. 21,

"Sec. 2 of the Act directs the Secretary of the Interior to make examinations and surveys and to construct irrigation works. In order to carry out these operations there has been gradually created what is known as the Reclamation Service, * * * Sec. 2 also directs that a report be made giving the results of examinations and surveys, estimates of cost, and all other facts relative to the practicability of each irrigation project. These matters of COST and PRACTICABILITY are FUNDAMENTAL, and great care is taken to check the preliminary ESTIMATES against the facts obtained by actual experience as the work progresses."

And we find the Chief Engineer entering into an important contract with the State of Nevada, through its State Engineer, on July 1, 1903, for the division of the cost of the surveys of the Truckee-Carson Project, which is set forth at length in

2nd Ann. Rep. R. S. 40.

His name is signed to each and every one of the Annual Reports to Congress from First to Fifth, at pages 14, 19, 23, 18 and 14, respectively; and thereafter, having been converted into the Director of the U. S. R. S., until the present time. There was no adverse action on any of these reports by Congress, and under the authority of

Swigart vs. Baker, 229 U. S. 187,

more fully referred to in Par. f, Div. XVIII, of this Argument, supra, may it not be said, that under the law, as construed by Congress, that the Chief Engineer was really, in truth and in fact, for all practical purposes; the administrative and executive officer of the United States for the purpose of putting the Reclamation Act into effect? He was the principal officer of the Reclamation Service, which was created for the purpose of putting the Act into effect, and had full charge of all administrative matters, giving particular attention o departmental matters. See

1 C. J., 1239-40,
17 Cyc. 1579,
Black's Law Dict.,
Bouvier's Law Dict. and
Webster's New Inter. Dict.,

for the definition of "administration" and "administrative," and that "the term is very comprehensive, having reference to the administration of government," and is synonymous with "executive." And when our witness Wm. H. Lyon (Rec. 340 and 343) testified that the Chief Engineer stated on May 28, 1904, that he represented the Secretary, or the Interior Department, he fell far short of the truth, as the Chief could very well have said "I AM the Secretary—the Interior Department," with as much truth as Louis XIV is said to have exclaimed, "L'etat, c'est moi!"

e. Therefore, we earnestly contend that the Chief Engineer had as much power and authority as the Secretary to write, issue, circulate and publish the Pamphlet, Pltffs' Ex. 15 (Rec. 213-28); and that he was infinitely better qualified and better informed than the aged Secretary to write and speak of the estimated cost of the project; and that in anything he wrote in the pamphlet, or said at the mass meeting of May 28, 1904, heretofore and hereinafter described, he was, in truth, and in fact, for all practical purpose, under the law, the Secretary; and, that consequently the pamphlet should be read into the contract.

f. Nor need we fear the effect of the reservations made by the chief in the pamphlet (Rec. 216) and referred to in the Opinion (Rec. 553 and 564), for two reasons, at least. The Secretary himself was not stripped of his powers because of the catholic power vested in the Chief Engineer; and the Secretary's estimate of less than $40.00 per acre was ample margin to take care of all fair and reasonable changes in plans and estimates

contemplated from any fair and reasonable interpretation of the reservation; and the law itself is absolute that the charges shall be determined with a view of returning the estimated cost to the fund; and, as pointed out by the joint committee of Congress, Senate Doc. 719, page 68, supra, while some discrepancy might arise between the estimated and the actual cost, the wide difference between $35 per acre and $75 per acre is UNJUSTIFIABLE.

4.

THE PRELIMINARY NEGOTIATIONS, SURROUNDING CIRCUMSTANCES, AND INTENT OF THE PARTIES.

Still contending that the contract, from our standpoint, and when construed with Sec. 4, and has had read into the Pamphlet, Pltffs' Ex. 15, is unambiguous and means only the estimated cost of 1904 can be apportioned against our lands by the Secretary; but that if it is not construed with Sec. 4, and the pamphlet, it is clearly ambiguous and doubtful, we offer the following:

a. We take it to be fundamental, universal and incontrovertible law, that in construing an ambiguous contract, the intent of the parties and the surrounding circumstances will be considered; reason and equity will prevail; and the law under which it was made will be read into it.

"The primary rule in the construction of contracts is that the court MUST, if possible, ASCERTAIN and GIVE EFFECT to the mutual intention of the parties. * * * Greater regard is to be had to the clear intent of the parties than to any particular

words which they may have used in the expression of their intent."

13 C. J. 521, Sec. 842.

citing a wealth of Federal and other authority in notes 18 and 20.

And that "contracts must be construed with reference to the intention of the parties at the time of entering into the contract."

Ibid, page 523, citing

Com. vs. West Va., 238 U. S. 202.

"The words of a contract will be given a reasonable construction, where that is posible, rather than an unreasonable one; and the Court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation which evolves the most reasonable and probable contract should be adopted."

13 C. J. 540, Sec. 511.

"The intention of the parties is the cardinal and paramount rule. All others are subordinate. The parties should be bound for what they intended to be bound for and no more. To hold anyone bound further, would be to impose upon him an obligation which he never assented to, or intended to take upon himself, and would be the height of injustice and oppression."

6 R. C. L. 835, Secs. 225-6.

The preliminary negotiations may be considered. Sec. 228 Ibid.

For reasonableness see Sec. 230 Ibid.

For surrounding circumstances see Sec. 239 Ibid.

To the same effect is

(Division XXIII, Subd. 4, Pars. b and c.)

Elliott on Contracts, Secs. 1508, 1517,1518,1519, and 1521.

b. In view of the fact that the contract, by its express terms, makes the Reclamation Act a part of it, it would seem unnecessary to cite authority in support of the proposition that the law is written into all contracts but in abundance of caution, and with apologies to the Court, we cite:

13 C. J. 560, Sec. 523,
6 R. C. L. 855, Sec. 243,
2 Elliott on Contracts, Sec. 1507.

c. We must first consider that at the coming of the Reclamation Service into the irrigation field at Yuma, Arizona, as a prospective competitor with the then existing, inefficient, but going concerns in the irrigation field, a newer and more formidable private competitor, Colorado Delta Canal Company, was actively and energetically pushing its scheme, advertised by an alluring prospectus of a much more elaborate and cheaper plan than that offered by the Reclamation Service; see

Plaintiffs' Exhibit 17, Rec. 243,

and was securing and executing contracts whereby it undertook to construct the larger project for $15.00 per acre. See Plaintiffs' Exhibit 18 (Rec. 245). That after grave and widespread discussion amongst the private landowners—all others being neglible—it was finally determined to enter into negotiations with the government, if a satisfactory price could be arrived at, and to refuse the offers of the Delta Company.

See testimony of BONDESSON (Rec. 239-40-41):

(Division XXIII, Subd. 4, Par. d.)

"It was a debatable question as to which way we should go * * * There was a new company coming into the field, known as the Colorado Delta Canal Company, San Francisco capitalists."

The testimony of INGRAHAM (Rec. 322-3):

"One of the chief duties that I had as local counsel. and that the Board of Directors or Governors of the Water Users' Association had was to try to make some arrangements with these various water companies that were already on the ground by which they might get out of the field and leave the way open for a government project. And we felt that this Colorado Delta Canal Company might be a stumbling block in the way, and the government engineers, as I remember, particularly Mr. Lippincott, was of the same opinion, and that proposition or the negotiations between the government and the Water Users' Association should be hastened along and brought to a conclusion in order that we might decide this matter before the field was complicated by this additional water company, the Colorado Delta Canal Company. Therefore, this letter which has been introduced in evidence, written by Mr. Winsor, president of the Water Users' Association, and, of course, on behalf of the Association, asking for the results of the preliminary surveys, the plans and estimates by government engineers, and the cost of construction, etc., should be written and in that way the matters opened for a negotiation more formally than they had been."

Also see testimony of Wm. H. LYON (Rec. 341.)

d. Before proceeding further we should consider, in connection with what must have been in the minds of the settlers as to the cost per acre of the proposed project, the formal report of the Board of Consulting Engineers, under date of April 8, 1904 (Pltffs' "Exhibit

16," Rec. 235). Their report shows (Rec. 236) that they had modified their estimates (their "Exhibit 2," Rec. 187-198), which will show that they had raised the estimate upon the Indian weir type of dam, which was the type adopted and constructed:

5th Ann. Rep. R. S. 100,

from $894,458 (Rec. 186) to $918,821 (Rec. 198), and that the estimates for engineering and contingencies had been raised from ten per centum to fifteen per centum in nearly every instance. They further show (Rec. 236) that the estimated cost of the project was so great that it was not feasible unless practically all of the land should contribute. And they deemed it imperative that all the owners should execute liens on their lands. Then it was shown by the testimony of Mr. Bondesson (Rec. 238-9) that there was practically a mass meeting held in consultation with the Board of Consulting Engineers and that it was discussed as to whether or not the lands within proposed Yuma Project could stand a charge as high as $35 per acre, it being a matter of doubt. But finally the board informed those present that they had recommended the construction of the project, notwithstanding the high cost of $35 per acre. To the same effect is the testimony of W. H. LYON (Rec. 340).

e. Then it was that, acting under the directions of the supervising engineer of the Reclamation Service, the Plaintiff Corporation, through its President and Board of Governors, addressed to the Secretary of the Interior the letter of May 3, 1904, which is the first page of the

pamphlet, our Ex. 15 Rec. 213, wherein it was prayed that the Secretary "FURNISH TO THE PEOPLE of this section, through this Association, a statement of the CHARACTER AND COST of the said proposed irrigation works (along the Lower Colorado, as shown by report of consulting engineers) with instructions as to how we shall proceed in order to do our part in securing the construction of the same." Even more significant and pointed is the request of the Board of Governors itself, of the same date of, and referred to in, the said President's letter (Pltffs' Ex. Rec. 24 and 288). and which is shown to have been signed by all the governors see testimony of O. P. Bondesson (Rec. 247), although the copy in evidence, our Exhibit 19, shows only three signatures. In that request the board on behalf of the Association and a large majority of the landowners, respectfully petitioned the Secretary of the Interior to submit through the Association to the landowners living within the boundaries of the district proposed to be irrigated and reclaimed, the Lower Colorado Irrigation District, as shown by Sec. 2, Art. IV of the Articles of Incorporation (Rec.145), COMPLETE PLANS OF THE IRRIGATION WORKS PROJECTED FOR THE LOWER COLORADO VALLEY, AND THEIR COST PER ACRE TO THE LAND THAT CAN BE IRRIGATED, BOTH public and private, together with information, etc." Mark that the Association had been organized for the purpose of, among others, paying back what should be DUE the government (Rec. 145); the Reclamation Service had been conducting exhaustive and expensive surveys and investigations for nearly two

years; that the report of the Board of Consulting Enginers had been made, our Ex. 2 and 16 (Rec. 164 to 198 and 235), showing the project as outlined could be constructed for $3,000,000, and recommending that the Supervising Engineer, Lippincott, be instructed to proceed with the preparation of detailed plans and specifications for the project (see last paragraph of Ex. 16). And the $3,000,000 be set aside in the Reclamation Fund for the construction of the project—all nearly a month prior to the writing and mailing of these pertinent and potently significant requests.

f. On May 9, 1904, the Director of the U. S. G. S., our Ex. 3, acting on the report of the Board of Consulting Engineers, reported to the Secretary that upwards of 85,000 acres could be reclaimed for less than $40 per acre, and that owing to the extreme fertility of the soil and general climate the cost of $40 per acre is NOT PROHIBITIVE; and recommended the setting aside of $3,000,000 of the Reclamation Fund for the construction of the Yuma Project (incidentally that $3,000,000 was real, honest-to-God money, actually and physically in existence in the Reclamation Fund, and not a paper appropriation. (Rec. 439).

(g) On the next day the Secretary adopted the recommendations of the Director, our Ex. 4 (Rec. 201), and actually set aside the $3,000,000 in real money to do the work. That was an answer to our requests of May 3, 1904, but to clinch the matter we received the pamphlet from the Chief Engineer, the pamphlet Ex. 15 (Rec. 213 to 228), incorporating the letter of the Secretary of May 10, 1904, which commences, "May 16, 1904, Yuma

County Water Users' Association. Gentlemen:—Your communication of May 3, 1904, etc., is hereby acknowledged. The Chief Engineer, etc., will meet you at Yuma May 27 next to confer with you, etc." (Rec. 215.)

h. In reply to your request for information as to the COST AND CHARACTER OF WORKS, the following general statement is made, etc., (Rec. 216), with certain reservations. But clearly that is answer to our requests of May 3, 1904. The surveys, etc., are shown, maps have been made, etc., ESTIMATES are shown to have been made for everything conceivable. A Board of Consulting Engineers has been through the ESTIMATES IN DETAIL, and their report is the result of the DELIBERATIONS and BEST JUDGMENT OF ALL THESE MEN, and all ESTIMATES and PLANS HAVE BEEN BROUGHT TO THE COMPLETE satisfaction of each person, including, of course, Mr. (now Director) Davis (Rec. 217). It is estimated there will be a net area altogether of 86,700 acres of irrigable land (Rec. 218). And then the dam, the canals, the Gila crossing, the levees and the drainage system are each taken up in the detail (Rec. 218 to 224) and the summary (Rec. 224) shows that the ENTIRE COST of this enterprise will amount, according to the ESTIMATES, to about $35.00 per acre IRRIGATED. It may, however, be SOMEWHAT increased or LESSENED, although an effort has been made to COVER ALL CONTINGENCIES, and the ESTIMATES of COST HAVE BEEN LIBERAL (Rec. 225). The price will RANGE NEAR $35.00 per acre, to be paid in ten annual installments. All of which closes with the official declaration of the Secretary that

upwards of 85,000 acres can be reclaimed at LESS THAN $40.00 per acre (Rec. 226).

i. Then the landowners and settlers were gathered together at Yuma, Arizona, on the day and night of May 28, 1904, at the request of the Secretary. Practically everyone interested was there, in person or by proxy (Rec. 325-6, and the preceding Div. XXII of this Argument). The Pamphlet, Pltffs' Ex. 15, was delivered to all of them; and at night in the mass meeting the Chief Engineer and the Supervising Engineer addressed them at length and fully explained to them the nature of the project, its cost and worth to them, and how long it would take to build it. Each of them was positive that the work could be, and would be, completed for the estimated cost of $35 per acre, within two years from the time the work would actually commence:

See testimonies of

BONDESSON, Rec. 266-7 and 8;
INGRAHAM, Rec. 328-29-30-31-32;
LYON, Rec. 340-41-42;
GREER, Rec. 353-54;

And the Chief Engineer, to put the finishing touch on things, gave it as his opinion that the cost would rather underrun than overrun the estimated figures, and that it would be materially LESS than $35 and that figure allowed for everything. His speech was rather elaborate—quite complete (BONDESSON—Rec. 260), and as we have heretofore shown, and as appears at pages 275, 333, 342, 347 and 354 of the Record, they believed in and relied upon the contents of the pamphlet and the

statements of the engineers, and were induced thereby to mortgage their lands to secure the estimated cost, and they would not have done so if they had not believed in and relied upon the pamphlet and the engineers.

j. Then and there, as expressed by the Supervising Engineer in his telegram of May 10, 1904, Pltffs' Ex. 20 (Rec. 250), the proposition was entirely dependent on the irrigators—the settlers and landowners signing contracts, it being immperative that they execute liens on their lands (Board of Consult. Engrs.' Rep. Rec. 236), and thereby mortgage their homes to secure the ESTIMATED COST of the construction (3rd Ann. Rep. R. S. 55); and they had the advice of their counsel (as more fully shown in Par. c, Subd. 2, of this Div. XXIII, p. 164 supra), that the mortgage could not exceed the estimate as made and announced; also it would be the same as turning over their lands and saying to the Secretary, 'Take this, and do as you will with it.'" (Rec. 333.)

k. The land owners and settlers were equal to the emergency, they granted the imperative lien, they did sign the contracts, following the "instructions" as to how they "should proceed"—they MORTGAGED THEIR LANDS to secure the REPAYMENT OF THE ESTIMATED COST OF CONSTRUCTION OF THE PROJECT; and, we ask, what must have been in THEIR MINDS, what must have been THEIR INTENT, when they did so? There can be but one possible answer, and it is obvious: to get a complete irrigation plant, and to pay $3,000,000 therefor at about, or ranging near, $35.00 per acre, in no event to exceed

$40.00 per acre.

l. What must have been in the mind, and what must have been the intent, of the Secretary of the Interior? To wilfully, ingeniously, and disingenuously, mislead the landowners to believe that the cost, and the estimated cost, of the project was to be LESS than $40.00 PER ACRE, in the aggregate $3,000,000 (even that amount known to the Secrertary to be just on the verge of being prohibitive to the landowners, see Pltffs' Ex. 3 (Rec. 200); and thereby induce them to place a blanket mortgage on their lands to secure any sum that he or some other Secretary might 13 years later foolishly, corruptly or arbitrarily assess against their lands, knowing all the time that the project could not and would not be built within any reasonable time for anything like the estimates? Perish the degrading thought! Our national pride, our reliance upon honest human nature, the common experience of the commercial world, forbid any such debasing and impossible conclusion. The obvious and correct answer is that the Secretary, from the surveys, maps, plans and ESTIMATES of COST knew what he was doing and that the project COULD BE AND WOULD BE COMPLETED within two years from the commencement of work for the sum of $3,000,000, at a cost of less than $40.00 per care; and that he intended to deliver a completed irrigation project for that amount of money, and at that charge per acre.

m. The contract is dated May 31, 1906, but the testimony of Bondesson (Rec. 317), the directions of Par. 24, of the Pamphlet of Organization of W. U. Ass'ns (Par. b, subd. 1 of this Div. XXIII, supra), and the con-

tract's own terms (2nd "Whereas," Rec. 42) shows that it was contemplated by both parties thereto to have gone into effect immediately after May 28, 1904, at any rate, the liens, the Articles of Incorporation, and the contract are one, as before shown. In any event, on May 31, 1906, there had been no change in the conditions, plans, or estimates.

4th Ann. Rep. 97, et seq.

n. What then was the mutual intent of the parties to the contract? The answer is just as obvious as the answer to the other two questions—to have a complete going irrigation project, over the whole district, at a cost of $3,000,000, and less than $40.00 per acre. It is absolutely conclusive, as we see it, that we did not waive our rights by the contract.

(Division XXIV, Subd. 1, Par. a.)

XXIV.

"THE PROPOSED WORKS" HAVE NOT BEEN COMPLETED.

In our 24th ground of the First Specification of Error we assail the finding of the Trial Court (Rec. 563-4), to the effect that from a practical standpoint it is thought that the Yuma Project was completed on April 6, 1917. That finding we believe to be as entirely unsupported by the evidence as is the finding set forth in our 15th ground of the First Specification of Error, to the effect that the annual net revenue per acre of the project (Rec. 561); but, not only that, it is directly contrary to all the evidence, and unsupported by the pleadings, as we shall proceed to show in the following:

1.

WHAT ARE "THE PROPOSED WORKS?"

a. The contract provides (Rec. 44) that the first annual payment for the Yuma Project "shall be payable at the time of the completion of said proposed works." Clearly there is no ambiguity as to the time when the first payment shall be made; but as there are no plans or specifications annexed to the contract, and no reference to any such, we must look outside of the contract to determine what are "the proposed works." The dedefendants offered no evidence and advanced no theory as to what the proposed works are. It may be that later in their brief, or oral argument, they may contend that the nature, scope, and extent of "the proposed works" rests entirely in the prophetic mind of Director Davis. However, we have a definite and well defined theory of what "the proposed works" were in 1904-5-6 when the

contract was finally executed; and we offered voluninous evidence to establish that theory.

b. The proposed works are clearly and certainly set forth and described in the Pamphlet, Pltffs' "Ex. 15" (Rec. 213-228); and in Pltffs' Ex. 2 (Rec. 164-198); but more vividly delineated on the large map, Pltffs' "Ex. 26," not incorporated in the record, but here for inspection. A replica of the map made part of Pltffs' Ex. 15 is shown on the next succeeding page. As shown by all the oral evidence we contracted on the Pamphlet, Plttfs' Exhibits 15 and 26. Substantially the same description of the project is set forth in:

3rd Ann. Rep. R. S. pp. 192-199.

There is also a map at p. 192 of that Report marked "General Map of Proposed Yuma Project," which is substantially the map set forth here. And in the 4th, 7th and 8th Annual Reports of the Reclamation Service, at pages 97, 59 and 54, respectively, will be found the statement that detailed information and description of the Yuma Project will be found in the 3rd Annual Report.

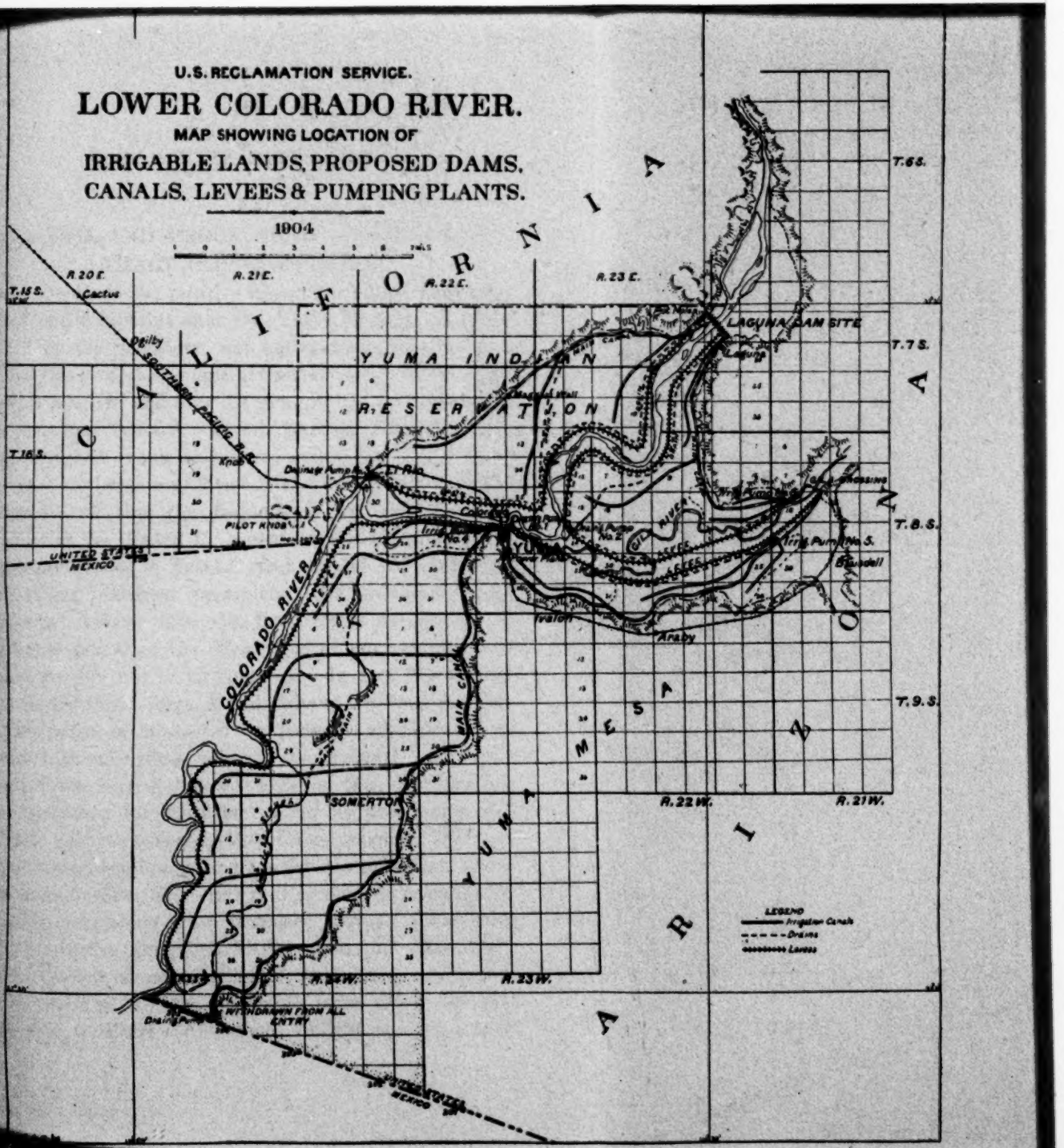
c. But the map in the Report we never saw; and, as heretofore repeatedly shown the Pamphlet, Pltffs' "Ex-15," was extensively and industriously circulated for years; at least two reprints thereof having been made and circulated (Rec. 310); and not only did all the landowners and settlers contract with reference to the pamphlet; but all the new purchasers of land for years acquired title to their land on the strength of it (Rec. 279 and 348-350).

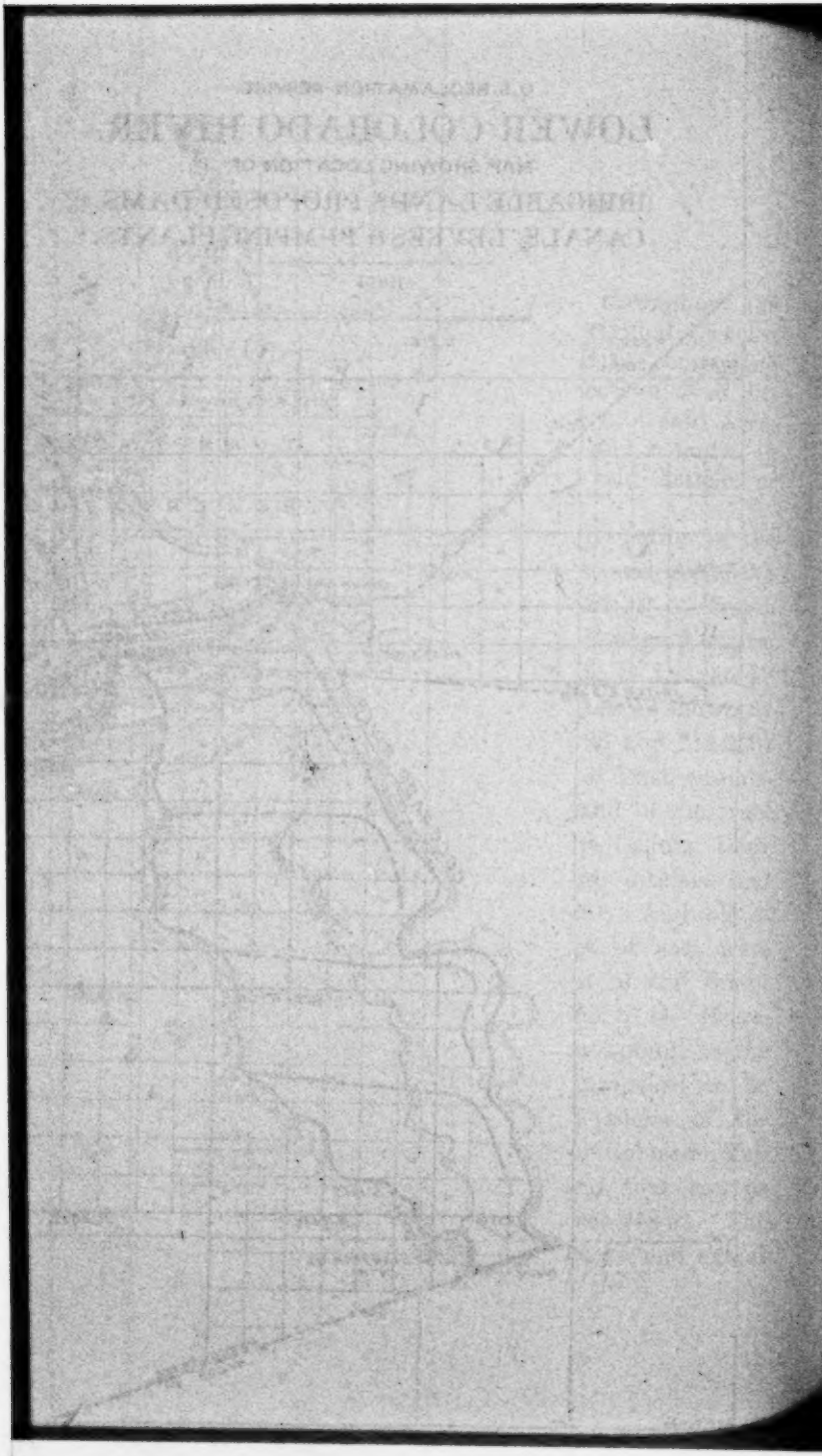
d. There can be no doubt or ambiguity as to the area which was to be reclaimed. The contract itself (Rec.

44) provides that:

"The cost per acre shall be equal throughout the entire district now proposed to be irrigated thereby, which said district is hereby defined as comprising the lands described and bounded in Section 3 of Article IV of the Articles of Incorporation of said Association, and also the lands described and bounded in Article IV of the amendments of the said Articles of Incorporation of said Association."

And reference to the Articles of Incorporation of the Association. Sec. 3 thereof (Rec. 145-6) and Article 4 of the amendment (Rec. 161), shows that all of Tracts A, B and C, as shown on Piltffs' "Ex. C" page 9, supra, constitute "the entire district proposed to be irrigated" by the contract. That is, the United States, as shown by the plans and specifications (Rec. 164-198 and 213-228) proposed and, by necessary implication at least, promised to reclaim all of Tracts A, B and C and to construct thereon and thereover, in addition to the Laguna Dam, an adequate system of canals, drainage ditches, and levees, as shown on the plat (Rec. 228). And all of those plans, specification and estimates of cost were furnished us in response to the request of the Board of Governors of the Plaintiff Association to the Secretary, under date of May 3, 1904, that he submit to the landowners living within the district proposed to be irrigated and reclaimed "COMPLETE plans of the irrigation works projected for the Lower Colorado Valley and their cost per acre to the land that can be irrigated, both public and private" (Rec. 248-9). The foregoing, we believe, determines the nature and extent of "the proposed works."


U.S. RECLAMATION SERVICE.
LOWER COLORADO RIVER.
MAP SHOWING LOCATION OF
IRRIGABLE LANDS, PROPOSED DAMS,
CANALS, LEVEES & PUMPING PLANTS.
1904
CALIFORNIA
ARIZONA
YUMA MESA
YUMA INDIAN RESERVATION
LAGUNA DAM SITE
Laguna
Dillby
SOUTHERN PACIFIC R.R.
Cactus
PILOT KNOB
Knob
Drainage Pump
El Rio
Wellton
Araby
Pump No. 2
Pump No. 4
Pump No. 5
Brunswell
OIL RIVER
COLORADO RIVER
LEVEE
MAIN CANAL
SOMERTON
UNITED STATES
MEXICO
WITHDRAWN FROM ALL ENTRY
R. 20 E.
R. 21 E.
R. 22 E.
R. 23 E.
R. 22 W.
R. 21 W.
R. 24 W.
R. 23 W.
T. 6 S.
T. 7 S.
T. 8 S.
T. 9 S.
T. 15 S.
T. 16 S.
LEGEND
Irrigation Canals
Drains
Levees



(Division XXIV, Subd. 1, Par. a.)

2.

PLEADING AND PROOF SHOW DRAINAGE FOR TRACT C UNCOMPLETED.

a. We made the positive allegation (Rec. 16) in Par. 18 of our complaint that the Yuma Project, as determined by the Secretary, was not completed at the time of the filing of the complaint; setting forth in said paragraph wherein and how the project was not completed, showing that Tract A was only partially completed and that it lacked canals and levees and a drainage system; and that no portion of Tract B had been in any way reclaimed; and that the drainage system had not been completed for Tract C, except about three miles of drainage ditches in Tract C, and that 44 per centum of the project remained incomplete. We contend that defendants' Answer (Par. 18, Rec. 92) is not an apt or sufficient denial of the allegations of our complaint as to the project not being complete. In fact the defendants admit that Tracts A and B have not been reclaimed, irrigated or protected by levees; and there is no denial that only three miles of the drainage system for Tract C has been completed; alleging that drainage has been provided for the same as far as practicable and feasible and the necessity therefor is revealed; and that proper provision has been made for the necessary drainage thereof (Rec. 93). But that is not, we respectfully submit, completing "the proposed works." The map annexed to the Pamphlet, Pltffs' "Ex. 15" (Rec. 228), shows thereon about 22 miles of main drain, and plaintiffs' "Exhibit 2," the estimates, show (Rec. 185 and 195) that in Tract C there was 116,160 feet, or almost

exactly 22 miles, of main drainage provided for in the original estimate; and any allegation in the Answer that the defendants, or the Secretary, have provided drainage for Tract C, as far as practicable and feasible and the necessity therefor is revealed, and that proper provisions have been made for the necessary drainage thereof, is not a denial of our positive allegation, and it is not an averment of the fact, that those 19 miles of drainage canals, or any part thereof, had been completed within the meaning of the contract. We respectfully submit that on the pleadings alone we are entitiled to a reversal in this case.

b. If there should be any doubt as to whether or not there is an apt and sufficient denial of our allegation that the project was not completed on April 6 1917, and could not be, and would not be, for some two and a half years thereafter, we appeal to the uncontradicted evidence to show that the project was not completed on April 6, 1917, or even yet at the time of the trial of this case. At the time of the trial the witness Oscar P. Bondesson proved without contradiction (Rec. 358), that the "drainage system for Tract C is not completed. A drainage canal has been opened from near the Mexico line, extending northeastward somewhat centrally through the valley for a distance of twelve miles. At the lower terminus of this drainage canal is situated a pumping plant in which a PART of the units for pumping have been installed, and a part have not been installed; and (Rec. 359) one-third of the main canal is incomplete." The only attempt to refute or explain away Mr. Bondesson's testimony was by Mr. Davis (Rec. 404) by the promulgating of some esoteric reela-

mation-service theory that because other and further drainage might perchance be needed after the completion of the main drain that therefore the main drain while only about one-fourth completed was, "for all practical purposes," completed. We have no doubt that that sort of reasoning will be clearly understood by the sort of people that can understand and construe "estimated cost" to mean the actual computed cost after some twelve years of work, and who can construe the word "thereupon" to mean thirteen years thereafter; but we respectfully submit that to the average human being that kind of reasoning is not understandable. Mr. Davis showed by his testimony (Rec. 401-2) that drainage is necessary in Tract C. But if he had not shown it by his testimony, he would be estopped to deny the necessity of the drainage by his own and the Secretary's report to Congress.

15 Ann. Rep. R. S. 75-77,

shows that on December 4, 1916, within four months of the issue of Public Notice of April 6, 1917, relied upon by the defendants, no work had yet been done upon the drainage system in Yuma Valley; but that preliminary plans were considered and some investigations carried on for the work proposed:

16th Ann. Rep. R. S. 62.

"Surveys for main drain and laterals were in progress in Yuma Valley. Elevations on test wells at practically all section corners of the valley were taken, and these denoted a general rise in the ground water. Construction work was started on the main drain the latter part of December, 1916. Up to June 30, 1917, the work had progressed to station 146.

(Division XXIV, Subd. 1, Par. c.)

The yardage amounted to 113,794 cubic yards. Fiive highway bridges and four metal flumes were constructed over drainage canals. A temporary pumping plant was built and operated at the lower end of the drain."

And which also shows the state of the work on the main drain in Tract C on June 30, 1917, three months after the issuance of the Public Notice.

c. Notwithstanding the opinion of the Circuit Court of Appeals, that it is of no real importance, the causing of us to begin the payment of the installments of the cost of the project even one month too soon, is a material and serious injury and damage to the plaintiffs, and each and all of them. Immediately upon the becoming due of the first installment of the cost on December 1, 1917, as required by the purported Public Notice of April 6, 1917, defendants' "Ex. 8" (Rec. 469), and according to its terms (Rec. 472), and the terms of the water right application, Pltffs' "Ex. D" (Rec. 50), the plaintiffs will be mulcted in interest and penalties to the extent of at least 1 per cent per month on the unpaid installments—that rate of interest and penalty being prescribed by he 20-year Extension Act of August 13, 1914;

38 Stat. 686.

According to the undenied allegations of the complaint the Public Notice of June 6, 1917, was, in any view of the case, premature to the extent of 2½ years. Surely if the defendants can insist that the contract means what it says, and that it is unamibuous, when it says that the plaintiffs shall pay that "part" of the cost apportioned by the Secretary, we have the right to insist

that the contract be enforced to the letter where the language is certainly unambiguous, in providing that we shall not pay the first installment until the completion of the proposed works.

d. If there were only some trifling thing to be done to complete the project, such as the construction of a headgate here, or the placing of a small lateral there, or something of that sort, we would not, and probably could not equitably, complain, but with practically nineteen miles of main drainage canal to be built on June 30, 1917, three months after the issuance of the Public Notice (as we believe the Court will take judicial notice that a station in civil engineering is 100 feet; and the 16th Ann. Rep. page 62 shows that the work on the drainage canal had been extended only to station 146, considerably less than three miles) is not a trifling thing, but a material and substantial part of the project; and until the main drainage in Tract C was constructed, the proposed works were not completed, even on the defendants' own theory; leaving out of consideration altogether the fact that nothing had been done on Tract B, and but very little on Tract A. We respectfully insist that on the pleadings and the proof, and even accepting the appellees' own theory of the case, in everything but as to the completion of the drainage system in Tract C, we are entitled to a reversal in this case on the plainest principles of law and equity. The contract has not been complied with either in letter or in spirit; and it will be inequitable and wrong to require the plaintiffs to commence paying the installments on the amount due for the cost of the construction of the project, whatever it

may be, at least 2½ years prior to the time that we had contracted to make the first payment.

3.

THE GILA VALLEYS ARE PART OF PROJECT

We now approach what we deem to be one of the most astonishing set of circumstances in civil engineering and equity jurisprudence; that is, the facts concerning the completion, or non-completion ,of the Gila portion of the Yuma Project, and its purported elimination from the project.

a. We contend that from the 10th day of May, 1904, until the filing of this suit on June 30, 1917, the Gila portions of the Yuma Project, Tracts A and B, were part of the Yuma Project, and were such parts legally, rightfully and contractually; and as a feasible, practicable engineering proposition; and that so far as any legal of effective action has been taken by the Secretary (if he were vested with such power) Tracts A and B are part of the Yuma Project today. On this we are not resting on any construction of the contract or description therein of the proposed works, but upon the express statements of the Secretary made fourteen consecutive times over his official signature; and in a variety of different ways; and in practically every instance particularly describing Tracts A and B by acres. Here is the list:

A, Letter of May 10, 1904, Plttfs' Ex. 4 (Rec. 201),
B, 3rd Ann. Rep. R. S. 63, 192, 196, 197.
C, 4th Ann. Rep. R. S. 98 and 99.
D, 5th Ann. Rep. R. S. 100, 101, 102, 103.
E, 6th Ann. Rep. R. S. 74 and 76.

(Division XXIV, Subd. 3, Pars. b, c and d.)

F, 7th Ann. Rep. R. S. 59.
G, 8th Ann. Rep. R. S. 54.
H, 9th Ann. Rep. R. S. 73.
I, 10th Ann. Rep. R. S. 74.
J, 11th Ann. Rep. R. S. 55.
K, 12th Ann. Rep. R. S. 60 and 344.
L, 13th Ann. Rep. R. S. 74 and 76, 408 and 409.
M, 14th Ann. Rep. R. S. 57, 59 and 404.
N, 15th Ann. Rep. R. S. 69, 71, 73 and 658.

b. But so that there may be no misapprehension, and for the convenience of the Court, we here set forth at length some of the statements in the reports to Congress.

In the 5th Report, at page 100, we find the following:

"At the Yuma Project (Pl. XII) the waters of Colorado River will be diverted about 10 miles northeast of Yuma, Ariz., into two canals, one on each side of the river. In Arizona these canals will lirrigate all the bottom lands of Colorado and Gila Rivers between the Laguna Dam and the Mexican boundary, and in California the bottom lands in the Yuma Indian Reservation."

c. And in the 7th Report, at pp. 59-60, we find the following, which was substantially repeated in the 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th Annual Reports:

"A detailed description of the Yuma Project will be found in the 3rd Annual Report ,and general descriptions relating to the project are given in the Second, Fourth, Fifth and Sixth Annual Reports. Briefly, the present irrigation plan of this project involves the construction of the Laguna Dam across the Colorado River about 10 miles northeast of Yuma, Arizona, for the purpose of divreting water into two canal systems,

one on each side of the river, covering lands in the Colorado and Gila River valleys in the vicinity of Yuma."

d. We take the following from a table, containing other immaterial matters, in

14th Ann. Rep. R. S. 404.

IRRIGABLE AREA.

Ariz.-Calif.: Yuma—	Acres.	Total Acres.
Gila Valley (Ariz.)	19,000	
Yuma Valley (Ariz.)	53,130	
Mesa Pump (Ariz.)	40,000	
Reservation (Cal.)	15,127	127,257

e. Then we come to the 15th Annual Report made to Congress on December 4, 1916, just four months prior to the issuance of the purported Public Notice of April 6, 1917, and in that volume we find the following statements at the following pages:

"IRRIGATION PLAN.

"Page 69. The irrigation plan of the Yuma Project provides for the diversion of water from the Colorado River at the Laguna Dam, 10 miles northeast of Yuma, Ariz., into two canal systems, one heading on the California side, conveying water to the irrigable lands on that side of the river, including those in the Yuma Indian Reservation, crossing the river at Yuma through an inverted siphon and serving lands in the Colorado Valley below Yuma, and the other heading on the Arizona side of the stream and watering lands in the Colorado and Gila Valleys lying east of the Colorado and north of the Gila * * *

"CANAL SYSTEMS.

"Page 71. The Gila Valley unit comprises 16,000 acres, of which 10,000 lies SOUTH and 6,000 NORTH of the river. The Arizona main canal has been con-

structed for a distance of 4.7 miles below Laguna Dam. Work on this canal was commenced in April, 1909, and finished in February, 1912. The capacity is 250 second feet and the yardage moved was 156,000. Connecting with this canal are 14 miles of laterals, which were built from April, 1911, to February, 1912, and January, 1913, to April, 1913. This system partially supplies a gravity area of 4,000 acres. In 1913 a pumping plant was installed, which can water an area of 2,000 acres. No construction work has been started in the South Gila Valley."

f. At page 658 of the 15th Annual Report, where the irrigable area of the various projects is set forth in an elaborate table, from which we take, excluding several columns that are not material here, the following for the Yuma Project:

IRRIGABLE AREA.

State, Project and Unit—	Acres.
Arizona-California-Yuma	128,000
Arizona	113,000
California	15,000
Units—	
Gila Valley (Arizona)	18,000
Yuma Valley (Arizona)	55,000
Mesa Pump (Arizona	40,000
Reservation (California	15,000

g. And we find from 16th Ann. Rep. R. S. 63 et seq. that the following work was done and expenditures made on the Gila portion of the project during the fiscal year ending June 30, 1917, and as late as March, 1917, as well as an estimate of contemplated work for the fiscal year of 1918, for the sum of $2,000!

(Division XXIV, Subd. 3, Pars. h and i.)

(Page 63) "Gila Valley: In February and March, 1917, the upper 4 miles of the Arizona levee were raised an average of 18 inches by means of drag-line excavator, 23,988 cubic yards of earth being moved in this work. In July, 1916, 990 cubic yards of rock were placed at the upper end of the levee. In January, 1917, 1,098 cubic yards of rock revetment were placed at the end of spur dike No. 3."

(Page 63) "North Gila Valley, 18.5 miles of canal in operation."

(Page 67) Shows expenditure of $8,750 on Gila Valley portion Yuma Project during fiscal year 1917, for floor protection."

(Page 68) "Estimated cost of contemplated work, Yuma Project, during fiscal year 1918.

(Among others)

North Gila Valley.....$2,000"

h. And a startling and significant fact is gathered from Mr. Davis on cross-examination (Rec. 449-450-1), wherein it is shown that the levy, or charge, per acre for the cost of the Laguna Dam is $16.60; on a gross cost for the dam of $2,103,361, which is the actual cost of the dam.

15th Ann. Rep. R. S. 82,

and divided by 127,251, the number of acres in the project (14th Ann. Rep. 404), gives $16.60 per acre.

therefore, showing conclusively that the cost of dam was levied over the Gila portion of the project! Once again was Mr. Davis' utterly refuted by the official reports.

i. To summarize the foregoing evidence (and we again remind the Court that in accordance with the stipulations of the parties and the order of the Lower Court, Rec. 203, 208, all these public documents are in

evidence), it appears as a fact that at the time of the determination of the practicability of the Yuma Project on May 10, 1904, continuously down to December 4, 1916, just four months before the issuance of the Public Notice in this case, and in all human probability long after the Public Notice had actually been prepared, the Secretary of the Interior had officially determined at least sixteen times that the Gila portions of the Yuma Project was practicable and advisable; and that as late as March, 1917, six days before the date of the Public Notice, the Reclamation Service was actually performing work and expending public moneys thereon; that eighteen and a half miles of canals were actually in operation on the North Gila portion, and that some time during the 1917 fiscal year $8,750 were expended for flood protection on the Gila Valley portion of the project, and that on December 5, 1917, when the 16th Report was made to Congress, and eight months after the issuance of the Public Notice in this case, that there was an estimated cost, or appropriation, of $2,000 for the North Gila portion of the project, Tract A, as described in plaintiffs' complaint, and the cost of the dam was actually levied at the rate of $16.60 per acre on Tracts A and B. "May we not" again appeal to the doctrine laid down in

Swigart vs. Baker, 229 U. S. 187,

and say, Congress having so frequently had those reports before it, and not having acted adversely upon them, or any of them, that it has become the law of this case that the Gila portions are a part of the project; or, at least, that the Secretary and the appellees are es-

topped to say that they are not part of the project?

Thus according to the solemn and official announcement of the Secretary himself Tracts A and B were an integral and feasible part of the project to the extent of 18,000 acres on December 4, 1916, and that in March, 1917, he was causing work to be done thereon. Certainly no action of the Secretary or the Director of the Reclamation Service was taken between the last mentioned dates and the institution of this suit on June 30, 1917, or else the defendants in this case would have produced some evidence tending to prove that fact.

j. It will not do to say, as was argued below that the Public Notice of April 6, 1917, declared the Gila portions of the project unfeasible, or eliminated them from the project (if such were possible). We may scan the notice (Rec. 469-74) from A to Izzard, and there is not a single reference to the Gila portion of the project or any part of it; it deals solely with the lands in Tract C; and it is no different in any way from the first Public Notice issued for the Yuma Project on January 12, 1910:

9th Ann. Rep. R. S. 79.

There are some more things in the first Public Notice, because of it being former Indian land being first settled and entered upon. But as in the Public Notice of April 6, 1917, it describes the land subject to the Public Notice, and otherwise purports to conform to the provisions of Sec. 4 as to those particular lands.

k. It might just as well be argued that when the Public Notice of January 12, 1910, was issued for the Indian Reservation portion of the Yuma Project that that Notice ipso facto and eo instanti determined the

Arizona portions of the Yuma Project to be no longer feasible or practicable, and thereby eliminated them from the project, as it is to contend that the notice of April 6, 1917, eliminated the Tracts A and B from the Yuma Project; even if it should be conceded that the Secretary of the Interior had the power by a stroke of his pen in the year 1917, to determine them unfeasible and elminate them from the project.

4.

TRACTS A AND B FEASIBLE AND ADVISABLE.

a. But even on the question of the feasibility of the Gila portions of the project, we have met Director, and Witness Davis on his own ground, and defeated him. The Trial Court not having passed upon or decided the question of feasibility, attempted to be raised by the Answer (Rec. 92, and sustained by the testimony of Mr. Davis; therefore, we may contend here, we believe, that on that point we have the preponderance of the evidence.

b. Francis L. Sellew, a civil engineer of as long standing as Mr. Davis, and of more varied experience; and for nine years Project Manager of the Yuma Project (Rec. 507) gave as his opinion that the project was not completed; Rec. 507 (and that was certainly bringing coal to Newcastle); and goes on (Rec. 508-9-10-11 and 12) to fet forth an apparently logical and necessary plan for the control of the Colorado River and the completion of the Yuma Project as a whole, as originally planned, as shown by Plaintiffs' Exhibit 2 (Rec. 164-198) and 15 (Rec. 21-23-28); and that he prepared such a plan, and reported it to his superiors (Rec. 510) in 1912;

and that in the Summer of 1913 he made another report to the same effect, and in December, 1913, a Board of Consulting Engineers, consisting of Gen. Wm. L. Marshall, U. S. A., Consulting Engineer to the Secretary of the Interior, and Louis C. Hill, a Supervising Engineer of the U. S. R. S., was appointed (Rec. 512), and that they endorsed his plans (Rec. 510), which were later approved in Washington (Rec. 511), and the work ordered done, and actually done (Rec. 518).

c. See the report of the consulting engineers, Pltffs' Ex. 33 (Rec. 513-18); and we find by

13th Ann. Rep. R. S. 74, 1914:

"Arizona side, above Yuma: The work of river-front protection consisted of establishing a camp at Laguna Dam, opening quarry, laying track for 7 miles below the same, construction of 3 SPUR DIKES, etc."

And we find

14th Ann. Rep. R. S. 58, 1915,

"GILA VALLEY: No work was done on this branch of the levee system, EXCEPT that * * * 360 yards of rock was placed on SPUR DIKES 2 and 3 of Arizona levee."

And we find in

15 Ann. Rep. R. S. 74-5-6, 1916,

(P. 74) "That it was determined in 1913 to attempt the protection of the levees on the Arizona side, 5 miles below Laguna Dam, by abatti dikes, and that two were built of combined length of 1,800 feet, and

Pp. 74-5) "Further details the work done in 1914 on the SPUR DIKES;" and

(P. 76) "That during the fiscal year 1915-6, in Gila Valley, 9,000 yards of rock placed * * * and

in revetting ends of dikes, whose purpose it was to REGULATE the river channel," and

And we find in

16th Ann. Rep. R. S. 63, 1917.

"In January, 1917, 1,098 yards rock revetment were placed at the end of SPUR DIKE No. 3."

d. The foregoing evidence has the double effect of utterlly destroying the force and effect of Mr. Davis' testimony of the non-feasibility of the Gila portions of the project; first, by contradicting him by Sellew, Marshall and Hill; and later by another board consisting of Marshall, Hill, Henny, Long and Sellew (Rec. 519); and then by Mr. Davis himself, for in 1914 he was Chief Engineer (13th Rep. 477), and in 1915, 1916 and 1917, he was Director and Chief Engineer (see 14th Rep. 477; 15th Rep. 772 and 16th Rep. 558), and he is certainly the officer at Washington who approved of the Sellew plan; and he is estopped to deny it, as his name is signed to each of the three last-named reports on the letters of transmittal; and second, by showing, again the official and, as we contend, the Congressional approval, ratification, and re-determination of the practicability and advisability of the Gila portions of the Yuma Project.

e. Let us not be misunderstood. We are not asking, before we should be required to commence paying the estimated cost of the project, that the levees and river banks be rock-revetted, and all that sort of expensive work done. We are simply asking that "the proposed works," as set forth in the plans and specifications, Pltffs' Exhibits 2 and 15, the earth levees, and sufficient canals be built as outlined in 1914; and if then it

should be determined that other and more expensive works are necessary to preserve them, a new contract could be made therefor under the provisions of Sec. 4 of the 20-year Extension Act, 38 Stat. 686.

f. It may very well be that the contract, by its express terms, requires the United States, to do nothing whatever; although, if it were necessary, we should strenuously contend that by the strongest implication it requires the government to construct "the proposed works" according to the plans and specifications, Pltffs' Ex. 2 and 15, and within two years from the time of the commencement of the work, as promised by the Chief Engineer, on May 28, 1904. But we are not here asking for a mandamus to compel the Secretary to perform his contract, we are simply seeking to enjoin him from compelling us, by wrongful and inequitable means, to begin payments for the construction cost before they are due, to our great and irreparable damage. To quote the opinion of the Trial Judge, the terms of the contract "are perfectly plain and positive" that the first payment shall be made at the time of the completion of said proposed works. We are asking that those perfectly plain and positive terms be enforced.

5.

THE ATTEMPT TO ELIMINATE TRACTS A AND B FROM THE PROJECT

a. Now we come to the belated attempts of the defendants, and their superior officers, by some sort of an ipse dixit. or an "imperium in imperio," as it were, to eliminate the Gila portions, Tracts A and B, from the Yuma Project; heretofore made a part of the sub-

ject-matter of our 13th Ground of the First Specification of Error and the argument in support thereof. Assuming that J. G. White & Co. (the contractors for the dam) had taken the contract from the plaintiffs to construct the entire irrigation system for the Yuma Project for the gross sum of $3,000,000, and, within the time limited in the supposed contract, had completed the project, to the extent that it is now completed by the Reclamation Service, and we refused to pay the contractor for the reason that it had not complied with its contract, and the contractor was suing on the contract, and we should set up in our defense that it had entirely failed to do any work whatsoever upon the south Gila portion, and had done but very little on the North Gila portion; would it not be a ludicrous spectacle in a court of law for he contractor, after that defense had been raised and urged, to say that it, the contractor, had without our knowledge or consent, and after the action had been instituted, determined that the Gila portions of the project were no longer feasible, and, through its Chief engineer, had so declared, somewhere out of our hearing and beyond our knoweldge; but that, nevertheless, it was entitled not only to the original contract price, equaling the charge of about $35 an acre, but that it was entitled to enough money to equal a charge of $75 per acre? Of course, a contractor in a case of that kind would not be seriously listened to; and yet that is precisely what the defendants are attempting to do in this case; and are so attempting without any warrant of law and in spite of the law, and in direct violation of the terms of the contract.

(Division XXIV, Subd. 5, Par. b.)

b. It was urged below, and apparently with great success with the Trial Court, that the Secretary was, in effect, some sort of an autocratic ruler like unto the former Czar of Russia, or else that in everything in connection with a reclamation project he is acting in a judicial capacity, and that a mere contract with this autcratic officer meant nothing at all, as he could rescind it at any time in his discretion; and the defendants, as in the case of the Public Notice, iterated and reiterated, in season and out of season, in thei objections to the evidence, in their oral argument, and in their written brief, "In the Secretary's discretion!" "In the Secretary's discretion!!" "in the Secretary's discretion!!!" When, as a matter of fact, the Secretary has no discretion whatever in any matter connected with this suit. Any discretion that he ever had was EXERCISED and EXHAUSTED when, on May 10, 1904, he deermined the Yuma Project to be practicable and advisable; and he more certainly yet LOST the LAST VESTIGE OF DISCRETION vested in him when he SIGNED THE CONTRACT in issue here. We challenge the industry and ability of learned counsel on the other side to produce to this Court A SINGLE AUTHORITY supporting their contention that the Secretary is vested with any discretion whatsoever to MODIFY or VARY the TERMS OF THE CONTRACT OF MAY 31, 1906. Again we remind the Court that the United States of America, even when it acts in cases of this kind through its AUTOCRATIC and ALL POWERFUL Secretary of the Interior (as contended for by the defendants), it is a mere private corporation, and it is BOUND by its

contracts like any of its citizens:

39 Cyc. 742—Note 5—supra.

And, if in this case, there had been any MISTAKE in the investigations, calculations and estimates of cost of the Engineers, and the Consulting Board of Engineers (consisting of, among others, Mr., now Director, Davis), in the year 1904, the proper remedy, to get relief from that mistake, would have been a suit in equity to reform the contract, instead of attempting by a stroke of the pen, or rather without a stroke of the pen, and simply by the testimony of a biased and interested witness to rescind a SOLEMN, WRITTEN CONTRACT, entered into fifteen years before.

[Mr. Davis while on the stand persisted, as we thought, in issuing his ipse dixits, to which we objected (Rec. 390), but the Court held that it deemed the witness to be simply testifying AS AN EXPERT. Therefore, as we shall later show, there is nothing in this case eliminating the Gila portions from the project, except the testimony of Mr. Davis. As to Mr. Davis being a biased and interested witness, we offer that in its least invidious sense, but there can be no doubt that Mr. Davis deeply resents the bringing of this suit, and he is certainly interested that his views and actions as Director of the great Reclamation Service should be sustained. And while we have, justly we believe, assailed the business methods and financial wisdom of the officers of the Reclamation Service and asserted, and now assert, that their "Force-Account" system is a time-destroying and money-eating monster

(* * * "of so frightful mien,

As to be hated needs but to be seen;
Yet seen to oft, familiar with her face,
We first endure, then pity, then embrace.")

Yet their works are, in many instances, monuments to the genius of American engineering and, while there have been unsavory rumors amongst the uninformed rabble, no one of common information has yet charged the Reclamation Service, or any of its principal officers, with graft or fraud; and the best evidence that such charges, if made, would have been unfounded, is that F. H. Newell, who for 12 years was Chief Engineer and Director of the Reclamation Service, is now, as we are informed, teaching in an obscure college in Illinois.]

c. And, at this point, we ask the Court to contemplate the ludicrous spectacle that a law officer of the United States would present, coming into a court of equity in the summer of 1917, and asking the Court to reform a contract entered into under date of May 31, 1906, but in fact in the summer of 1904, after two years and $175,000 had been spent in making investigations to determine if the project were practicable and advisable and, after the Secretary had for 14 consecutive times reported to Congress, as required by law, that the project WAS PRACTICABLE and ADVISABLE, and that he had been spending money upon alleged unfeasible portions as late as March 31, 1917, and that during the pendency of the suit, he had actually made an appropriation of $2,000 to continue work upon the same portions.

(Division XXIV, Subd. 5, Par. d.)

d. We now direct attention to the lame, impotent, inequitable and untimely method adopted by the defendants to win his law suit. The complaint in this case was filed on June 30, 1917. And as before shown, up to that minute there can be no question but that Tracts A and B were portions of the Yuma Project; and the only evidence in this case that, by any hook or crook by the ipse dixit of the Director, or otherwise, they have ceased to be a part of the project, is defendants' "Exhibits 3 and 4" (Rec. 396-398) which, we respectfully submit, do not, and do not purport to, eliminate such portions from the project, or to in any way declare or determine that any portion of the Yuma Project is feasible or unfeasible (defendants' "Exhibit 2" was rejected, on our objection; but seems to have been admitted under Rule 46). A mere glance at those exhibits will show that they simply purport to restore to the public domain certain lands that had heretofore been withdrawn from entry under the provisions of the Reclamation Act. And to show how meaningless such purported RESTORATIONS were, we point to the fact that one of our plats, "Exhibit 5" we believe (not in the Record, but here for inspection), will show that the greater portion of the land purported to be restored were patented many years before the Reclamation Act became a law. Take for instance Twp. 8 S., R. 22 W., as shown on page 397 Record, and just to give a few examples, the SW¼ of Sec. 26 was patented to Frank L. Ewing on November 21, 1894; the S½ of Sec. 28 was patented to Richard R. Wheeler on February 8, 1892; and the N½ of Sec. 34, (except one 40) was patented to John Dodd on Novem-

ber 16, 1891. And yet it is seriously contended that those two instruments, defendants' "Exhibits 3 and 4," actually had the double effect of rescinding the contract of May 31, 1906, and eliminating all of the Gila Valley from the Yuma Project. A mere statement of the facts suggests the absurdity.

e. The Secretary of the Interior not having, in fact, eliminated Tracts A and B, or attempted to eliminate them, so far as the evidence in this case discloses, it is unnecessary; we believe, to discuss his right and power to do so if he had made such an attempt. But it will, of course, be seriously urged here, notwithstanding the apparent absurdity of the contention, that the Secretary did have such power, and that he actually exercised it; and, in anticipation, we urge that the Secretary, like a private individual, HAS NO POWER to RESCIND or MODIFY a CONTRACT without the consent of the other party; and that he having, on May 10, 1904, determined the Gila portions of the Yuma Project to be practicable and advisable, and having continued to so determine, up until December 4, 1916, when he made his 15th Report to Congress, HE HAD EXHAUSTED HIS POWER in that regard; and he and his employes are, and of right ought to be, estopped to, untimely, inequitably and in bad faith, speak and act differently for the sole purpose of attempting to prejudice the adjudication of this case.

(Division XXIV, Subd. 5, Par. f.)

f. But it has been, and will be, no doubt, contended that Par. 3 of the contract (Rec. 44) gives to the Secretary the power to eliminate Tracts A and B. If that paragraph is intelligently read with a view of putting the whole instrument into effect, which of course, it should be, it will not bear the interpretation that it was ever contemplated by the parties, or that it is in the contract, directly, or indirectly, expressed or impliedly, that the Secretary may at any time, and by a stroke of his pen complete the project by striking therefrom 20,000 of its fairest acres. Paragraph 3 of the contract has to do, not with the question as to whether certain canals, levees and drainage ditches may be constructed over, upon, or around certain acres of land, and whether or not their construction is practicable and advisable from a financial standpoint; but had to do with that particular lands may, or may not, be irrigable because of the existence, or non-existence, of WATER RIGHTS therefor, based upon the amount of water then appropriated therefor, and the amount to be thereafter appriated therefor, measured and limited by beneficial use. Par. 3 is so plain on that as to need aid from no other portions of instrument. "The Secretary shall determine the number of acres so capable of irrigation aforesaid (Rec. 44) How capable of irrigation? By the amount of water appropriated and to be appropriated, and for which water rights exist, of course, his determination to be made upon due and expert consideration of all available data. Available data concerning what? Water rights and water appropriations, of course. And to be BASED UPON, and MEASURED and LIMITED

by the BENEFICIAL USE OF WATER. It speaks for itself. But read the last "whereas" and paragraphs 1, 2 and 3, of the contract, together, and it becomes, if possible, still plainer that water rights, water appropriations, and the beneficial use of water is being dealt with and nothing else.

g. Those are stereotyped provisions in all these kinds of contracts. (See Appendix B, Pamphlet Organization of W. U. Assn.) When our contract was made it had little, if any, application to the Yuma Project, for there was a world of unappropriated water in the Colorado River NOT being beneficially used. But through lapse of time, and the debilitating and destroying effect of "force account," our project not being completed, and but little water being used beneficially on the lands in Tract C for ten years, and practically none on the Gila tracts, other rights became vested by the beneficial use of water in Imperial Valley, California, it may be very well be that, unless the question has been settled by the contract between the United States and the Imperial Irrigation District, testified to by Director Davis and Senator Winsor (Rec. 446 and 537), Par. 3 of the contract will be a live and important part thereof.

h. It has been, and will be, contended also that the reservation in the Pamphlet, plaintiffs' "Exhibit 15" at page 216 of the Record, gives to the Secretary the power to eliminate such vast portions of the project as the 18,000 or 20,000 acres in the Gila Valley. We find this, in:

3rd Ann. Rep. R. S. 192:

"The question of the irrigable acres cannot be stated ABSOLUTELY until the canals and levees are finally

located. It is now ESTIMATED that 97,000 acres will be irrigated in the valley, from which ABOUT 10 per cent must be deducted for sloughs and sand-dune land."

And to the same effect is the testimony of Wm. H. Lyon (Rec. 341). The same processes of reasoning, or unreasoning, which will be used to sustain the contention that the Secretary of the Interior might by one stroke of his pen, eliminate the 20,000 acres in the Gila Valleys, could be used to sustain the absurdity that the Secretary might continue to eliminate acre after acre, and section after section, and township after township, from the Yuma Project, until all should have been eliminated therefrom, and nothing left therein to bear the cost of the construction of the project, but the irrigable lands in he western portion of the city of Yuma.

6.

We believe that we have demonstrated that as a matter of fact, and as a matter of law, the proposed works have not been completed, neither as to Tracts A and B, or C. We again point out that on the day that this suit was filed that there were yet 19 miles of the main drainage canal in Tract C to be completed; and that at the time of the trial of this case there was at least one-third of he main drainage canal to be completed. Therefore, we respectfully insist, that entirely aside from the question as to what charge per acre the lands within the Yuma Project should bear, that we are entitled to a reversal in this case, and that the defendants should be restrained from shutting off our water; and that the purported Public Notice of April 6, 1917, should be declared null and void for all purposes whatsoever.

(Division XXV, Pars. a and b.)

XXV.

THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS' BILL.

We have now reached appellants' 25th Ground of the First Specification of Error, attacking the final decree of the Trial Court (Rec. 564) dismissing our bill and our suit, and denying us the relief prayed for, which we respectfully insist was error for all of the reasons set forth in the foregoing argument, Divisions I to XXIV. We might, we believe, submit this ground of Error by simply referring to all of the preceding Argument, but we offer the following:

a. We respectfully submit that the decree is unsupported by the evidence, as is particularly shown in Divisions XXIII and XXIV of this Argument; all of which are here respectfully referred to and resubmitted; and that such decree could only be entered by entirely ignoring the provisions of the contract, plaintiffs' "Exhibit C" (Rec. 41). And there can be no doubt of the irreparable injury sought to be inflicted upon us by the defendants if we are right in our contentions. It needs no argument to prove that water is the very life of land in the vicinity of Yuma, Arizona. Even if the appellees' theory of the case, that $75 per acre is a proper and legal charge to be levied upon our lands, and that the project, so far as the Gila portions thereof are concerned, is constructively completed, is sound, yet to require us to pay the first installment of the construction charge many years prior to the completion of the main drain in Tract C, is inequitable and wrong.

b. It is inequitable and wrong for the decree, by denying us any relief, to compel us to pay a charge of

$75 per acre, instead of the $35 per acre, or MATERIALLY LESS, for which the Chief Engineer, with his universal power and authority (see Division XXIII, Subdivision 3, Par. d, of this Argument, supra), promised us the project could be completed, on May 28, 1904 (Rec. 266). That the ESTIMATED COST, and not the ACTUAL, or the COMPUTED cost, should be returned to the Reclamation Fund, we believe that we have shown in Divisions XVII, XVIII, VIX, XX, XXI and XXIII of this Argument, all of which are respectfully referred to and made part of this paragraph.

c. From the evidence set forth in subdivision 3 of Division XXIV of this Argument, supra, we contend that the plaintiff Archie J. Griffin, and the landowners in Tract A, for whom he sues, are just as much entitled to relief as any of the other plaintiffs.

d. That the homesteaders are entitled to the relief specially prayed for by the corporate plaintiffs, we believe we have shown by our Argument in Division XVI hereof, which is respectfully referred to and made part of this paragraph.

e. Again we say that there can be no doubt, if our contentions are right, either as to the charges per acre we should be required to pay, or to the contract not having been completed; that as to the completion of "the proposed works" that the defendants were proceeding inequitably and wrongfully to our irreparable injury, and they should be perpetually enjoined from so doing In support of that we offer all of the arguments heretofore advanced in Paragraphs a, b, c and d of this Division.

f. Right or not, in our other contentions, there can

be no doubt of the inequity and the unconscionableness of contract, the Water-Right Application, Plttfs' "Ex. D" (Rec. 48-55), which the defendants were threatening to compel us to execute and deliver to them before we could secure water; and in support of that we offer all the arguments heretofore urged. In any view of the case, Section 8 of the Water-Right Application (Rec. 53), is an attempt to compel us to convey our property to the United States without compensation, in violation of the Constitution. In the consideration of the greater questions at issue in this case the wrongfulness and inequity of that paragraph has been overlooked. There were some avowals made in open court during the trial and some of the wrongful and unconstitutional provisions would be stricken therefrom, but those avowals are rather hazy, and the only way to have them put into full force and effect is by the reversal of the decree, and the judgment of this Court that no such provisions should ever be placed in any contract tendered to the plaintiffs, as a prerequisite to secure a water supply for their lands.

g. We respectfully contend that on all of the evidence, all the law, and according to the plainest principles of equity, the decree should be reversed, and that the plaintiffs should have all the relief prayed for.

XXVI.

Our 26th Ground of the First Specification of Error is simply the converse of our 25th Ground; and all the arguments that have been urged in the preceding Division XXV in support of our 25th Ground, are here respectfully referred to and made part of this Division. For it necessarily follows, that if the Trial Court

erred in dismissing plaintiffs' bill, that it erred in refusing us the relief prayed for in the Bill of Complaint.

XXVII.

THE ERRORS PECULIAR TO THE CIRCUIT COURT

In our Second Specification of Error, and on three grounds, we attack certain special expressions of the Circuit Court of Appeals as set forth in its Decision (Rec. 632), which we believe are erroneous.

I.

The First Ground complains of the finding and decision of the Circuit Court to the effect that the Public Notice of April 6, 1917, was given in clear accord with the Statute. That, of course, we take issue with; but argument thereon would lead to a repetition of all that we have before set forth in Division XXII, supra; and all that we have set forth as to the meaning of "thereupon" as used in Sec. 4 of the Reclamation Act. Evidently the Circuit understands "thereupon" to mean 13 years thereafter, else it would not have found that the Notice of 1917 was given in clear accord the statute. We trust this Court, from a reading of the Statute and a consideration of what was sought to be accomplished thereby—so that the settlers and landowners might be advised in advance as to the cost of the Project, as set forth in the speech of Mr. Mondell, Subd. 3, Div. XIX, page 103 supra; Report of Congressional Committee, Senate Document 719, 61st Cong. 3rd Session, page 120 supra; and the opinion of Judge Dietrich, 263 Fed. 738, page 123 supra—will not come to the conclusion that the Public Notice of 1917 was given in CLEAR accord with the Statute.

(Division XXVII, Subd. 2 and 3.)

2.

The Circuit Court finds that our contention that Project was not finished and that the time had not arrived at the trial of the case for the commencement of the payment of the installments of the Cost, is of no real importance. That is almost adding insult to injury. The contract of May 31, 1906, calls for the "completion of the proposed works" before we begin paying. It is admitted that 20,000 acres of the Yuma Project has not been finished—hardly touched; and the uncontradicted evidence and the officials Reports of the Secretary of the Interior shows conclusively that on the day we filed this suit only three miles of 22 miles of main drainage canal, a substantial part, indeed, of "the proposed works" had been built; and that only one half of the same drainage was completed at the time of the trial. We do not mean the drainage system as a whole. but the main canal itself as marked upon Pltffs' Exhibits 15 and 26. We respectfully insist and urge that point is of real, tangible, first importance; and we did feel, fully appreciating the stupendous volume of business before the Circuit Court, and with profound respect for its learning and ability, that that point of ours was entitled a little more careful consideration than the curt and, we believe, erroneous expression thereon indicates it received. We respectfully refer back to Division XXIV hereof.

3.

The Third Ground of the Second Specification of Error is really but a repetition, as directed to the particular Decision and Decree of the Circuit Court of Ap-

peals, of the 25th and 26th Grounds of the First Specification of Error, and all arguments urged in support of these Grounds are hereby respectfully referred to and made part of this paragraph.

CONCLUSION.

(a) In finally submitting this case, we feel that we in many things owe an apology to the Court for the many imperfections of this brief, in intellectual design and execution, and mechanically, not the least of which is its great length, and many iterations. For instance, the question of the Public Notice, and whether one was ever issued at all or not, we deem of "no real importance" in the final determination of this case; for, as we have heretofore, successfully, we believe, contended, whenever the Public Notice was, or should have been, issued, it should contain as the charge to be levied upon our lands the amount of the ESTIMATED COST, and no more. Yet, owing to the firm and overpowering grip that defendants' theory concerning the Public Notice had upon the minds of the learned and conscientious Judge of the Trial Court, and the Judges of the Circuit Court, we deemed it wise to, at great length, in Division XXII of this Argument, exhaust, as we see it, the question of the Public Notice.

b. In determining the meaning of the words "estimated cost" we appeal to this Court to place itself in the position that Congress was in when it heard the prophetic language of the Minority Report of the House Committee on Arid Lands, H. Doc. 794, Part 2, 57th Congress, First Session, set forth in

Vol. 35 Cong. Rec. p. 6693,

a portion of which is set forth herein in the XIX Divis-

ion of this Argument; and when it heard the speeches of Senator Hansbrough and Mr. Mondell, excerpts of which are heretofore set forth in the same Division; also place itself in the position of the venerable Secretary of the Interior, E. A. Hitchcock, when he in the years 1903-4 and 5, in the 2nd, 3rd and 4th Reports of the Reclamation Service to Congress, at pp. 30, 31 and 21, respectively, so glowingly described the wisdom and utility of Sec. 4 of the Act in requiring that only the ESTIMATED COST should be returned to the Reclamation Fund; and in the place of the Joint Congressional Committee, headed by Senator Root, which reported to Congress that some discrepancies between the ESTIMATED and ACTUAL cost were unavoidable, but that the difference between $20 and $39 per acre was unjustifiable—as we contend that the difference between "materially less than $35 per acre," and $75 per acre, is unjustifiable.

(c) In construing the contract we appeal to the Court to consider the position of the plaintiffs and their predecessors in title in the year 1904, when we were induced to mortgage out lands "to secure the repayment of the estimated cost of the construction;" and that we had the advice of the ablest counsel in the great Southwest, Judge Joseph H. Kibbey, of Phoenix, Arizona, whose construction of the law, timely arrived at 16 years before the original decision in this case, was diametrically opposed to the conclusions of the Trial Judge in this case; and to consider that we entirely believed in, and relied upon, the oral promises of the Chief Engineer, who was, for all practical purposes, the Secretary of the Interior himself (see Par. d, Subd. 3, Div. XXIII,

of this Argument p. 172, supra), and that if we had not believed in and relied upon those promises we would not have mortgaged our lands to secure the payment of the estimated cost; and would probably have gone with the Colorado Delta Company in pursuance of the plan outlined in plaintiffs' "Exhibits 17 and 18" (Rec. 243-5): And they we ask the Court to

> "so far as possible put itself in the place of the parties when their minds met on the terms of the agreement, and then from a consideration of the writing itself, of its purpose, and of the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do, upon what sense and meaning of the terms they used, their minds actually met."
>
> Amer. Bond. Co. vs. Pueblo Invest. Co.,
> 80 C. C. A. 97,

reading at page 107, and the cases there cited.

d. And in determining whether the Yuma Project is completed, as provided in the contract, we ask the Court not to be misled by the stupendous and impossible fictions of Director Davis, that by some unheard of and unauthorized mental operation of his, the Gila portions of the Yuma Project had been eliminated therefrom; and to consider the evidence heretofore set forth in the subdivision 3 of Division XXIV hereof, showing how frequently, and in how many different ways, Director Davis himself had officially declared to Congress and otherwise, that the Gila portion of the project was practicable, advisable and feasible; and to consider the simple fact that when this proceeding was instituted that less than three miles of the main drainage in Tract C had been completed; it being an integral and substantial por-

tion of "the proposed works," as stipulated in the contract; and again we point out to the Court that we are not, as a prerequisite to commencing payment for the project, asking for rock revetments, and other expensive works; we are simply asking that "the proposed works" be completed simply and cheaply of earth, excavated and put in place by mule teams and scrapers as originally stipulated.

e. The appellants, simple farmers, have come to this Court believing that it is the fountain of justice, and that they will receive it by the reversal of the concurring decrees of the two lower courts. We are profoundly convinced that if we do not prevail here, it is because the law will not permit us; and that we shall not lose because of any feeling on the part of this Court, or any of its members, that the King can do no wrong; and that we should not win simply because we are, in effect, contesting with the Government itself; and that it should not lose, simply because it is the Government, even though it should be in fault through the neglect and inefficiency of its agents and employes; all of which, we are frank, to say, seemed to us to animate the Lower Courts. We are entirely dissatisfied, nay, almost utterly disgusted, with some of the reasons, and we we almost dare to say, the lack of reasons, advanced below for the adverse decisions. We feel, even if we should lose here, which we do not anticipate, that when this Court shall have, as is its invariable custom, expressed its views, lucidly, painstakingly and reasonably, justice shall have been done and the law properly

administered, and we shall bow to the decision. But until then we shall feel that we were in 1904 the victims of a confidence game put over upon us by our own Government, which we dearly, truly and loyally love; and that that confidence game has been given ruinous effect by the concurring decisions of the Lower Courts.

We, therefore, respectfully urge, and pray, that the concurring Decrees of the Lower Courts be reversed, and that the Appellants have the relief prayed for in their Bill of Complaint; either by the judgment of this Court, or directions to the Lower Courts, as this Court shall deem just and equitable.

THO'S. D. MOLLOY,
Counsel for Appellants.